Supreme Court, U.S.
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In The

Supreme Court of the United States

DENNIS HOLLINGSWORTH, et al.,

Petitioners,

v.

KRISTIN M. PERRY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

CHARLES J. COOPER
Counsel of Record
MICHAEL W. KIRK
JESSE M. PANUCCIO
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, NW
Washington, D.C. 20036
(202) 220-9600
ccooper@cooperkirk.com
Counsel for Petitioners

April 8, 2010

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

After this Court stayed the district court's order allowing the video recording and public broadcast of the trial proceedings in this case, the district court withdrew its order and assured the parties that its continued recording of the trial proceedings was solely for use in chambers and not for the purpose of public dissemination. In light of the apparent mootness of the controversy, the question presented is:

Should the Ninth Circuit's decision denying a petition for a writ of mandamus to halt the district court's enforcement of its order be vacated and the case be remanded to the court of appeals with instructions to dismiss in accordance with *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)?

PARTIES TO THE PROCEEDING BELOW

Petitioners in this Court, Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Mark A. Jansson, and ProtectMarriage.com – Yes on 8, A Project of California Renewal are Defendant-Intervenors in the district court and were petitioners in the Court of Appeals for the Ninth Circuit.

The United States District Court for the Northern District of California (Walker, C.J.) was the nominal respondent to the proceedings in the Ninth Circuit. *See* 9th Cir. R. 21-2.

Respondent William Tam is a Defendant-Intervenor in the district court and was a respondent in the Ninth Circuit.

Respondents Kristen M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo, are Plaintiffs in the district court and were respondents in the Ninth Circuit.

Respondent City and County of San Francisco is Plaintiff-Intervenor in the district court and was a respondent in the Ninth Circuit.

Other parties to the proceedings in the district court and Ninth Circuit, and thus Respondents in this Court, are Defendants Arnold Schwarzenegger, in his official capacity as Governor of California; Edmund G. Brown Jr., in his official capacity as Attorney General of California; Mark B. Horton, in

PARTIES TO THE PROCEEDING BELOW – Continued

his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; Linette Scott, in her official capacity as Deputy Director of Health Information and Strategic Planning for the California Department of Public Health; Patrick O'Connell, in his official capacity as clerk-recorder of the County of Alameda, California; and Dean C. Logan, in his official capacity as Registrar-Recorder and County Clerk for the County of Los Angeles, California.

CORPORATE DISCLOSURE STATEMENT

No corporations are parties, and there are no parent companies or publicly held companies owning any corporation's stock. Petitioner ProtectMarriage.com is a primarily formed ballot committee under California law. *See* CAL. GOV. CODE §§ 82013 & 82047.5. Its "sponsor" under California law is California Renewal, a California nonprofit corporation, recognized as a public welfare organization under 26 U.S.C. § 501(c)(4).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review an order of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The order of the Ninth Circuit denying the petition for a writ of mandamus (App. 1) is unreported. The order of the district court that was the subject of the mandamus petition (App. 2-3) is also unreported.

JURISDICTION

The Ninth Circuit's order denying the petition for a writ of mandamus was entered January 8, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, § 2 of the Constitution of the United States is as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and

> Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State, – between Citizens of different States, – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT

Most of the relevant background of this case may be found in *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010) (*per curiam*). We here repeat that background only as necessary to provide context for subsequent events and this petition.

Passed by the voters of California in November 2008, Proposition 8 ("Prop 8") amended the State constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5. Four individuals, Respondents here, brought suit in the Northern District of California to challenge Prop 8's constitutionality. The Governor and Attorney General of California declined to defend Prop 8, and Petitioners were permitted to intervene as defendants. The district court established a highly expedited trial schedule, with trial set to commence on January 11, 2010.

On September 25, 2009, the district court informed the parties of interest in publicly broadcasting

the trial proceedings and asked for their positions. *Hollingsworth*, 130 S. Ct. at 708. Respondents supported the idea, but Petitioners objected, arguing both that the district court's Local Rule 77-3 specifically banned the public broadcast of court proceedings and that, in any event, public broadcast of this particular case would fly in the face of the fair-trial considerations underlying the Judicial Conference's longstanding and consistent position in opposition to public broadcast of federal trial proceedings. App. 17-20; *Hollingsworth*, 130 S. Ct. at 708.

On December 17, 2009, the Ninth Circuit Judicial Council issued a press release announcing that it had approved a "pilot program" for "'the limited use of cameras in federal district courts within the circuit.'" *Id.* at 708 (quoting press release). The press release stated that cases would be selected for participation in the program "'by the chief judge of the district court in consultation with the chief circuit judge.'" *Id.* (quoting press release). The district court then issued "a series of postings on its website . . . purport[ing] to revise or propose revisions to Local Rule 77-3." *Id.* at 711; *see id.* at 708-09 (describing district court's efforts to amend rule). The amended rule would have created an exception to the general ban on recording or broadcasting court proceedings, "'for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit.'" *Id.* at 708, 711 (quoting amended Local Rule 77-3).

On January 7, 2010, the district court entered an order pursuant to amended Local Rule 77-3 asking

Ninth Circuit Chief Judge Kozinski to approve "'inclusion of th[is] trial in the pilot project.'" *Id.* at 709 (quoting order); *see* App. 3. The next day, Chief Judge Kozinski issued an order approving the district court's request to publicly broadcast the trial proceedings to certain other federal courthouses, but he deferred ruling on the request to disseminate the trial proceedings on the Internet until "technical difficulties were resolved." *Hollingsworth*, 130 S. Ct. at 709; *see* App. 4.

Also on January 8, Petitioners moved the district court for a stay of its order and petitioned the Ninth Circuit for a writ of mandamus prohibiting the district court from enforcing its January 7 broadcast order. *Id.* The district court never ruled on the stay motion, but the Ninth Circuit denied the mandamus petition that evening. *Id.*; App. 1

On Saturday, January 9, Petitioners filed in this Court an application for a stay of the district court's broadcast order pending resolution of a forthcoming petition for a writ of certiorari or mandamus. On the morning of Monday, January 11, just before commencement of the trial, the Court "ordered that the [district court's] order . . . permitting real-time streaming is stayed except as it permits streaming to other rooms within the confines of the courthouse in which the trial is to be held" and that "[a]ny additional order permitting broadcast of the proceedings is also stayed." Order, *Hollingsworth v. Perry*, 130 S. Ct. 1132 (2010). The Court noted that, "[t]o permit

further consideration in this Court, this order will remain in effect until Wednesday, January 13." *Id.*

At the opening of trial later that morning, Respondents asked the district court to videotape the proceedings for the purpose of later public dissemination "in the event the stay is lifted." App. 34-35. The district court accepted Plaintiffs' proposal over Petitioners' objection that recording the proceedings was not "consistent with the spirit of" the temporary stay issued by this Court. App. 35-36.

On January 13, this Court "grant[ed] the application for a stay of the District Court's order of January 7, 2010, pending the timely filing and disposition of a petition for a writ of certiorari or the filing and disposition of a petition for a writ of mandamus." *Hollingsworth*, 130 S. Ct. at 715. The Court found that the "amended version of Local Rule 77-3 appears to be invalid [because] the District Court failed to 'give appropriate public notice and an opportunity for comment,' as required by federal law." *Id.* at 711 (quoting 28 U.S.C. § 2071(b)). Recognizing that public broadcast may have a chilling effect not only on witnesses' testimony, but also on witnesses' willingness "to cooperate in any future proceedings," the Court determined that "irreparable harm will likely result from the denial of the stay." *Id.* at 712-13.

The Court also emphasized that a stay was necessary to vindicate its supervisory "interest in ensuring compliance with proper rules of judicial administration[, which] is particularly acute when those

rules relate to the integrity of judicial processes." *Id.* at 713. The Court determined that that interest was jeopardized by the district court's "attempt[ ] to revise its rules in haste, contrary to federal statutes and the policy of the Judicial Conference of the United States[, in order] to allow broadcasting of this high-profile trial without any considered standards or guidelines in place." *Id.* "[T]he lack of a regular rule with proper standards to determine the guidelines for broadcasting," the Court explained, "could compromise the orderly, decorous, rational traditions that courts rely upon to ensure the integrity of their own judgments." *Id.* at 713-14.

Finally, the Court observed that, even if Local Rule 77-3 "had been validly revised, questions would still remain about the District Court's decision to allow broadcasting of this particular trial." *Id.* at 714. Given the "high-profile" nature of the case and the "intense debate in our society" over the issues to be tried, the Court found that "[t]his case is . . . not a good one for a pilot program." *Id.* at 714. The Court, however, declined to "address other aspects of [the district court's] order, such as those related to the broadcast of court proceedings on the Internet, as this may be premature" in light of Chief Judge Kozinski's deferral of that issue. *Id.* at 709.

During the trial later that afternoon, the district court noted that "the Supreme Court has given us some guidance with respect to part of the issue" of broadcasting the proceedings. App. 38. Finding the Court's guidance "to be . . . rather limited," however,

the district court stated that "we may have issues beyond remote access to these proceedings by other courthouses." App. 38. The district court suggested "that we put that issue to the side for the time being and proceed with the trial," but emphasized that "we'll have to deal with [that] issue[ ] in due time." App. 38-39.

On January 14, Petitioners filed a letter with the district court "request[ing] that the [District] Court halt any further recording of the proceedings in this case, and delete any recordings of the proceedings to date that have previously been made." App. 21. Petitioners explained that, because of this Court's ruling on their stay application, the proceedings were governed by the unamended version of Local Rule 77-3, which "'banned the *recording* or broadcast of court proceedings.'" App. 22-23 (quoting and emphasizing *Hollingsworth*, 130 S. Ct. at 708).

A few hours later, the district court opened that day's trial proceedings by reporting that, "in light of the Supreme Court's decision yesterday, . . . [it was] requesting that this case be withdrawn from the Ninth Circuit pilot project," and that Chief Judge Kozinski had "indicated that he would approve that request." App. 41. "And so," the district court summed up, "that should take care of the broadcasting matter." App. 41.

Petitioners then asked the district court "for clarification . . . that the recording of these proceedings has been halted, the tape recording itself." App. 41-42.

When the district court clarified that the recording "has *not* been altered," Petitioners reiterated their contention (made in their letter submitted earlier that morning) that, "in light of the stay, . . . the court's local rule . . . prohibit[s] continued tape recording of the proceedings." App. 42 (emphasis added). Rejecting Petitioners' objection, the district court stated that the unamended "local rule permits . . . recording for purposes of use in chambers and that is customarily done when we have these remote courtrooms or the overflow courtrooms." App. 42. The district court added that the recording "would be quite helpful to [it] in preparing the findings of fact." App. 42. The district court concluded, "[T]hat's the purpose for which the recording is going to be made going forward. *But it's not going to be for purposes of public broadcasting or televising.*" App. 43 (emphasis added). The district court then repeated its position to make unmistakably clear the limited, private use to which it intended to put the recordings: after noting that "the [unamended] local rule[ ] [prohibits] '[t]he taking of photographs, public broadcasting or televising, or recording for those purposes,'" the district court stated: "So the recording is not being made for those purposes, but *simply for use in chambers*." App. 43 (emphasis added). In reliance on the district court's assurances that its sole purpose for continuing to record the proceedings was for its private use in chambers, Petitioners took no action to enforce this Court's stay or Local Rule 77-3.

On January 15, the district court formally "withdrew [its] previous request to include Perry et. al. v. Schwarzenegger et. al. in the Ninth Circuit's pilot program permitting broadcasting of district court proceedings in limited circumstances." App. 30. Chief Judge Kozinski promptly granted the district court's request "to remove *Perry v. Schwarzenegger*, No. 3:09-cv-02292-VRW, from th[e] pilot program" and "rescinded" his January 8 order designating this case for the pilot program. App. 5.

The district court then withdrew the amendment to Local Rule 77-3 authorizing participation in the pilot program. *Compare* App. 16 (showing Local Rule 77-3 without amendment as of February 2010), *with* App. 15 (showing Local Rule 77-3 as amended in December 2009). On February 4, the district court proposed again its original amendment to Local Rule 77-3 and invited comments on the proposed amendment until March 4. App. 28-29. The renewed proposed amendment to Local Rule 77-3 has not been made effective.

On January 27, the trial was adjourned. App. 47. The district court ordered the parties to submit proposed findings of fact and conclusions of law by February 26, and indicated that, after having an opportunity to consider those proposals, it would "set a date for closing argument." App. 45-46. The parties have now timely filed their proposed findings of fact and conclusions of law. But the parties are continuing to litigate over the district court's order compelling certain third-party organizations that campaigned

against passage of Prop 8 to produce to Petitioners certain internal campaign communications and other information. *See* Petition for a Writ of Certiorari, *Hollingsworth v. Perry*, No. 09-1210 (filed Apr. 5, 2010). The Ninth Circuit has issued an emergency stay of the district court's production order. *See id.* at 18-19. Closing argument has thus not yet been calendared.

On or shortly before March 2, 2010, the district court posted on its website a response to "[c]ertain recent articles [that] have reported incorrect information about possible broadcasting of closing arguments in" this case. App. 30. The district court's posting stated: "Broadcasting closing arguments would require Chief Judge Walker to request that these arguments be included in the Ninth Circuit's pilot program and approval of that request by Chief Judge Kozinski. No such request has been made." App. 30.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit denied Petitioners' request for a writ of mandamus to halt the district court's enforcement of its January 7 order allowing audio-video recording and public broadcast of the trial proceedings. This Court stayed the district court's broadcast order pending the filing and disposition of the instant petition, but actions by the district court since then appear to have rendered the mandamus petition moot. The Court, therefore, should grant this petition for a writ of certiorari, vacate the Ninth Circuit's

order denying the mandamus petition, and remand to the Ninth Circuit with instructions to dismiss the mandamus petition. *See United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

I. Petitioners' Mandamus Petition Is Moot

An "actual controversy must be extant at all stages of review." *Alvarez v. Smith*, 130 S. Ct. 576, 580 (2009) (quotation marks omitted). Where there had been but "no longer [is] any actual controversy between the parties," the case is moot. *See id.* at 580-81. The district court's actions subsequent to the Court's issuance of the stay appear to have eliminated the controversy underlying Petitioners' mandamus petition and thus to have rendered that petition moot.

The district court has withdrawn its January 7 order allowing audio-video recording and public broadcast of the trial proceedings and, concomitantly, Chief Judge Kozinski has rescinded his order approving the district court's broadcast order. The district court has also withdrawn the amendment to Local Rule 77-3 that purportedly authorized its broadcast order. Most importantly, the district court repeatedly and unequivocally assured Petitioners that its continued recording of the trial proceedings was not for the purpose of public dissemination, but rather solely for that court's use in chambers. And the district court has stated that it has not requested

authorization to publicly broadcast the closing argument.

As a result of these post-stay actions by the district court, Petitioners have, in effect, obtained the relief they sought through their mandamus petition; namely, preventing the district court from enforcing its order to allow the trial proceedings to be broadcast publicly or to be recorded for later public dissemination. Indeed, Plaintiffs themselves have acknowledged the "fact that these proceedings would not be broadcast to the public in any form" after the district court "withdrew its request to broadcast the proceedings to other federal courthouses and made clear that no such broadcast would take place." App. 26-27.

Petitioners' mandamus petition, therefore, appears to be moot. *See Williams v. Simons*, 355 U.S. 49, 57 (1957) ("By vacating the temporary restraining order and dismissing the complaint, the District Court has brought to pass one alternative of the order petitioners would have this Court issue, thus rendering the petition for all practical purposes moot."); *Cotlow v. Emison*, 502 U.S. 1068 (1992) ("The order of January 10, 1992, having vacated the order from which the appeal is taken, the appeal is dismissed as moot.").

II. The Court Should Vacate the Ninth Circuit's Order Denying the Mandamus Petition and Remand for Dismissal

"The established practice of the Court in dealing with a civil case from a court in the federal system

which has become moot while on its way here or pending [the Court's] decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *Munsingwear*, 340 U.S. at 39; *see also Alvarez*, 130 S. Ct. at 581; 28 U.S.C. § 2106. Because Petitioners did not "*cause[]* the mootness by voluntary action," the Court "should follow [its] ordinary practice" in this case: vacate the Ninth Circuit's order denying the mandamus petition and remand to the Ninth Circuit with instructions to dismiss the mandamus petition as moot. *Alvarez*, 130 S. Ct. at 582-83 (quotation marks omitted); *see also, e.g.*, *Joint Sch. Dist. No. 241 v. Harris*, 515 U.S. 1154, 1155 (1995) ("The petitions for writs of certiorari are granted. The judgment is vacated and the cases are remanded to the United States Court of Appeals for the Ninth Circuit with directions to dismiss as moot.") (citing *Munsingwear*).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant this petition for a writ for certiorari, vacate the order of the Ninth Circuit denying their petition for a writ of mandamus, and remand to the Ninth Circuit with instructions to dismiss the mandamus petition as moot.

April 8, 2010

Respectfully submitted,

CHARLES J. COOPER
Counsel of Record
MICHAEL W. KIRK
JESSE M. PANUCCIO
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, NW
Washington, D.C. 20036
(202) 220-9600
ccooper@cooperkirk.com
Counsel for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DENNIS HOLLINGSWORTH, et al., Petitioners, v. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, Respondent, KRISTIN M. PERRY; et al., Real Parties in Interest.	No. 10-70063 D.C. No. 3:09-cv-02292-VRW Northern District of California, San Francisco ORDER (Filed Jan. 8, 2010)

Before: SILVERMAN, PAEZ and BEA, Circuit Judges.

Petitioners have not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. *See Bauman v. United States Dist. Court*, 557 F.2d 650 (9th Cir. 1977).

Accordingly, the petition is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M PERRY, SANDRA B STIER, PAUL T KATAMI and JEFFREY J ZARRILLO,

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

ARNOLD SCHWARZENEGGER, in his official capacity as governor of California; EDMUND G BROWN JR, in his official capacity as attorney general of California; MARK B HORTON, in his official capacity as director of the California Department of Public Health and state registrar of vital statistics; LINETTE SCOTT, in her official capacity as deputy director of health information & strategic planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as clerk-recorder of the County of Alameda; and DEAN C LOGAN, in his official capacity as registrar-recorder/ county clerk for the County of Los Angeles,

Defendants,

No C 09-2292 VRW
NOTICE TO PARTIES

(Filed Jan. 7, 2010)

DENNIS HOLLINGSWORTH, GAIL J KNIGHT, MARTIN F GUTIERREZ, HAKSHING WILLIAM TAM, MARK A JANSSON and PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIOFORNIA RENEWAL, as official proponents of Proposition 8,

Defendant-Intervenors. /

After hearing the parties and counsel for media regarding the suggestion that the above action be included in the Ninth Circuit pilot project on audio-video recording and transmission announced on December 17, 2009, the undersigned on January 6, 2010 formally requested the Chief Judge of the Ninth Circuit to approve inclusion of the trial in the pilot project on the terms and conditions discussed at the January 6, 2010 hearing and subject to resolution of certain technical issues.

/s/ V Walker
VAUGHN R WALKER
United States District
Chief Judge

JUDICIAL COUNCIL
OF THE NINTH CIRCUIT

IN THE MATTER OF PILOT DISTRICT COURT PUBLIC ACCESS PROGRAM APPROVED DECEMBER 16, 2009	No. 2010-2 **ORDER** (Filed Jan. 8, 2010)

KOZINSKI, Chief Judge:

I have received a request from the Chief Judge of the Northern District of California to permit audio-video recording and transmission of pre-trial proceedings and trial in *Perry* v. *Schwarzenegger,* No. 3:09-cv-02292-VRW. The request is granted, limited to real-time live streaming to federal courthouses to be designated by the Circuit and Court of Appeals Executive, and subject to such procedures and limitations as the district judge presiding over the case may deem appropriate. The request for posting the files of the videos on the district court's website is still pending.

JUDICIAL COUNCIL

OF THE NINTH CIRCUIT

IN THE MATTER OF PILOT DISTRICT COURT PUBLIC ACCESS PROGRAM APPROVED DECEMBER 16, 2009	No. 2010-3 **ORDER** (Filed Jan. 15, 2010)

KOZINSKI, Chief Judge:

I have received a request from the Chief Judge of the Northern District of California to remove *Perry* v. *Schwarzenegger*, No. 3:09-cv-02292-VRW, from this pilot program. The request is granted.

Order No. 2010-2 is rescinded.

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART I. ORGANIZATION OF COURTS
CHAPTER 15. CONFERENCES AND COUNCILS OF JUDGES

28 U.S.C. § 332. Judicial councils of circuits

(a)

(1) The chief judge of each judicial circuit shall call, at least twice in each year and at such places as he or she may designate, a meeting of the judicial council of the circuit, consisting of the chief judge of the circuit, who shall preside, and an equal number of circuit judges and district judges of the circuit, as such number is determined by majority vote of all such judges of the circuit in regular active service.

(2) Members of the council shall serve for terms established by a majority vote of all judges of the circuit in regular active service.

(3) Except for the chief judge of the circuit, either judges in regular active service or judges retired from regular active service under section 371(b) of this title [28 USCS SS 371(b)] may serve as members of the council. Service as a member of a judicial council by a judge retired from regular active service under section 371(b) [28 USCS, 371(b)] may not be considered for meeting the requirements of section 371(f)(1)(A), (B), or (C) [28 USCS, 371(f)(1)(A), (B), or (C)].

(4) No more than one district judge from any one district shall serve simultaneously on the council,

unless at least one district judge from each district within the circuit is already serving as a member of the council.

(5) In the event of the death, resignation, retirement under section 371(a) or 371(b) of this title, or disability of a member of the council, a replacement member shall be designated to serve the remainder of the unexpired term by the chief judge of the circuit.

(6) Each member of the council shall attend each council meeting unless excused by the chief judge of the circuit.

(b) The council shall be known as the Judicial Council of the circuit.

(c) The chief judge shall submit to the council the semiannual reports of the Director of the Administrative Office of the United States Courts. The council shall take such action thereon as may be necessary.

(d)

(1) Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit. Any general order relating to practice and procedure shall be made or amended only after giving appropriate public notice and an opportunity for comment. Any such order so relating shall take effect upon the date specified by such judicial council. Copies of such orders so relating shall be furnished to the Judicial Conference and the Administrative Office of the United States Courts and be made available to

the public. Each council is authorized to hold hearings, to take sworn testimony, and to issue subpoenas and subpoenas duces tecum. Subpoenas and subpoenas duces tecum shall be issued by the clerk of the court of appeals, at the direction of the chief judge of the circuit or his designee and under the seal of the court, and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas and subpoenas duces tecum issued on behalf of the United States or an officer or agency thereof.

(2) All judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council. In the case of failure to comply with an order made under this subsection or a subpoena issued under chapter 16 of this title [28 USCS §§ 351 et seq.], a judicial council or a special committee appointed under section 353 of this title [28 USCS § 353] may institute a contempt proceeding in any district court in which the judicial officer or employee of the circuit who fails to comply with the order made under this subsection shall be ordered to show cause before the court why he or she should not be held in contempt of court.

(3) Unless an impediment to the administration of justice is involved, regular business of the courts need not be referred to the council.

(4) Each judicial council shall periodically review the rules which are prescribed under section 2071 of this title [28 USCS § 2071] by district courts

within its circuit for consistency with rules prescribed under section 2072 of this title [28 USCS § 2072]. Each council may modify or abrogate any such rule found inconsistent in the course of such a review.

(e) The judicial council of each circuit may appoint a circuit executive. In appointing a circuit executive, the judicial council shall take into account experience in administrative and executive positions, familiarity with court procedures, and special training. The circuit executive shall exercise such administrative powers and perform such duties as may be delegated to him by the circuit council. The duties delegated to the circuit executive of each circuit may include but need not be limited to:

(1) Exercising administrative control of all non-judicial activities of the court of appeals of the circuit in which he is appointed.

(2) Administering the personnel system of the court of appeals of the circuit.

(3) Administering the budget of the court of appeals of the circuit.

(4) Maintaining a modern accounting system.

(5) Establishing and maintaining property control records and undertaking a space management program.

(6) Conducting studies relating to the business and administration of the courts within the circuit and preparing appropriate recommendations and

reports to the chief judge, the circuit council, and the Judicial Conference.

(7) Collecting, compiling, and analyzing statistical data with a view to the preparation and presentation of reports based on such data as may be directed by the chief judge, the circuit council, and the Administrative Office of the United States Courts.

(8) Representing the circuit as its liaison to the courts of the various States in which the circuit is located, the marshal's office, State and local bar associations, civic groups, news media, and other private and public groups having a reasonable interest in the administration of the circuit.

(9) Arranging and attending meetings of the judges of the circuit and of the circuit council, including preparing the agenda and serving as secretary in all such meetings.

(10) Preparing an annual report to the circuit and to the Administrative Office of the United States Courts for the preceding calendar year, including recommendations for more expeditious disposition of the business of the circuit.

All duties delegated to the circuit executive shall be subject to the general supervision of the chief judge of the circuit.

(f)(1) Each circuit executive shall be paid at a salary to be established by the Judicial Conference of the United States not to exceed the annual rate of level

IV of the Executive Schedule pay rates under section 5315 of title 5.

(2) The circuit executive shall serve at the pleasure of the judicial council of the circuit.

(3) The circuit executive may appoint, with the approval of the council, necessary employees in such number as may be approved by the Director of the Administrative Office of the United States Courts,

(4) The circuit executive and his staff shall be deemed to be officers and employees of the judicial branch of the United States Government within the meaning of subchapter III of chapter 83 (relating to civil service retirement) [5 USCS § 8331 et seq.], chapter 87 (relating to Federal employees' life insurance program) [5 USCS §§ 8701 et seq.], and chapter 89 (relating to Federal employees' health benefits program) [5 USCS §8901 et seq.] of title 5, United States Code.

(g) No later than January 31 of each year, each judicial council shall submit a report to the Administrative Office of the United States Courts on the number and nature of orders entered under this section during the preceding calendar year that relate to judicial misconduct or disability.

(h)(1) The United States Court of Appeals for the Federal Circuit may appoint a circuit executive, who shall serve at the pleasure of the court. In appointing a circuit executive, the court shall take into account experience in administrative and executive positions,

familiarity with court procedures, and special training. The circuit executive shall exercise such administrative powers and perform such duties as may be delegated by the court. The duties delegated to the circuit executive may include the duties specified in subsection (e) of this section, insofar as such duties are applicable to the Court of Appeals for the Federal Circuit.

(2) The circuit executive shall be paid the salary for circuit executives established under subsection (f) of this section.

(3) The circuit executive may appoint, with the approval of the court, necessary employees in such number as may be approved by the Director of the Administrative Office of the United States Courts.

(4) The circuit executive and staff shall be deemed to be officers and employees of the United States within the meaning of the statutes specified in subsection (f)(4).

(5) The court may appoint either a circuit executive under this subsection or a clerk under section 711 of this title [28 USCS § 711], but not both, or may appoint a combined circuit executive/clerk who shall be paid the salary of a circuit executive.

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART V. PROCEDURE
CHAPTER 131. RULES OF COURTS

28 U.S.C. § 2071. Rule-making power generally

(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure pre-scribed under section 2072 of this title [28 USCS § 2072].

(b) Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be pre-scribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order.

(c)(1) A rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit.

(2) Any other rule prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.

(d) Copies of rules prescribed under subsection (a) by a district court shall be furnished to the judicial council, and copies of all rules prescribed by a court other than the Supreme Court under subsection (a)

shall be furnished to the Director of the Administrative Office of the United States Courts and made available to the public.

(e) If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment.

(f) No rule may be prescribed by a district court other than under this section.

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

[SEAL]

LOCAL RULES

(Dec. 2009)

Civil Local Rules

77-3. Photography and Public Broadcasting.

Unless allowed by a Judge or a Magistrate Judge with respect to his or her own chambers or assigned courtroom for ceremonial purposes or for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit, the taking of photographs, public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in connection with any judicial proceeding, is prohibited. Electronic transmittal of courtroom proceedings and presentation of evidence within the confines of the courthouse is permitted, if authorized by the Judge or Magistrate Judge. The term "environs," as used in this rule, means all floors on which chambers, courtrooms or on which Offices of the Clerk are located, with the exception of any space specifically designated as a Press Room. Nothing in this rule is intended to restrict the use of electronic means to receive or present evidence during Court proceedings.

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

[SEAL]

LOCAL RULES

(Feb. 2010)

77-3. Photography and Public Broadcasting.

Unless allowed by a Judge or a Magistrate Judge with respect to his or her own chambers or assigned courtroom for ceremonial purposes, the taking of photographs, public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in connection with any judicial proceeding, is prohibited. Electronic transmittal of courtroom proceedings and presentation of evidence within the confines of the courthouse is permitted, if authorized by the Judge or Magistrate Judge. The term "environs," as used in this rule, means all floors on which chambers, courtrooms or on which Offices of the Clerk are located, with the exception of any space specifically designated as a Press Room. Nothing in this rule is intended to restrict the use of electronic means to receive or present evidence during Court proceedings.

Cooper & Kirk
Lawyers
A Professional Limited Liability Company

1523 New Hampshire Avenue NW
Washington, D.C. 20036

Charles J. Cooper (202) 220-9600
ccooper@cooperkirk.com Fax (202) 220-9601

October 5, 2009

The Honorable Vaughn R. Walker
Chief Judge
United States District Court for the
Northern District of California
450 Golden Gate Ave.
San Francisco, CA 94102

Re: Recording and broadcast of proceedings in *Perry v. Schwarzenegger*, No. C-09-2292 VRW

Dear Chief Judge Walker,

I write on behalf of Defendant-Intervenors in response to the Court's inquiry regarding the parties' positions on "projecting [a video recording of the proceedings in this case] . . . beyond an overflow room," perhaps in the form of a public television broadcast. Hr'g of Sept. 25, 2009, Tr. 70-71.

It is Defendant-Intervenors' understanding that the policy of both the Northern District of California and the Judicial Conference of the United States prohibits any kind of photographic depiction of district court proceedings outside of the courthouse itself. According to this Court's General Order No. 58, the "[p]olicy of the Judicial Conference of the United

States prohibits, in both civil and criminal cases in all district courts, broadcasting, televising, recording, or photographing courtroom proceedings for the purposes of public dissemination." *See also* United States District Court for the N.D. Cal., General Information Guide for Journalists at 5 (July 14, 2009) ("Broadcasting of proceedings is prohibited by policy of the Judicial Conference of the United States."); JCUS-SEP 96, p. 54 (adopting ban on broadcasting); JCUS-MAR 96, p. 17; JCUS-SEP 94, pp. 46-47. *See also In re Complaint Against District Judge Joe Billy McDade*, No. 07-09-90083 (Memorandum of Chief Judge Easterbrook, 7th Cir. Sept. 28, 2009).

The Judicial Conference's policy is based upon the potentially negative impact that the public broadcast of federal trial court proceedings could have on the administration of justice. After an extensive study of the issue in 1994, the Judicial Conference rejected proposals for public broadcast of trial court proceedings. *See* JCUS-SEP 94, p. 47. As reflected in this Court's General Order No. 58, that policy, and the reasons undergirding it, remain in effect today. *See* Administrative Office of the U.S. Courts, "Implementation of the Long Range Plan of the Federal Courts: Status Report April 2008," ¶ 86d, *available at* http://www.uscourts.gov/library/Implementation_the_Long_Range_Plan.pdf ("The Conference continues to oppose cameras in the courtroom legislation,"). In testimony before Congress in September 2007, Judge Tunheim explained the Judicial Conference's position, in pertinent part, as follows:

> The Judicial Conference position is based on a thoughtful and reasoned concern regarding the impact cameras could have on trial proceedings. [Public broadcast has] the potential to undermine the fundamental rights of citizens to a fair trial. It could jeopardize court security and the safety of trial participants, including judges, U.S. attorneys, trial counsel, U.S. marshals, court reporters, and courtroom deputies. The use of cameras in the trial courts could also raise privacy concerns and produce intimidating effects on litigants, witnesses, and jurors, many of whom have no direct connection to the proceeding.
>
> . . .
>
> Because cameras in trial courts could profoundly and negatively impact the trial process, the Judicial Conference strongly opposes any legislation that would allow the use of cameras in the United States district courts.

Cameras in the Courtroom: The "Sunshine in the Courtroom Act of 2007," H.R. 2128: Hr'g Before the H. Comm. on the Judiciary, 110th Cong. (Sept. 27, 2007) (statement of The Honorable John R. Tunheim, Judge, United States District Court for the District of Minnesota and Chair of the Court Administration and Case Management Committee of the Judicial Conference), *available at* http://www.uscourts.gov/testimony/Tunheim_cameras092707.pdf. As Judge Tunheim concluded, "the Judicial Conference believes

. . . [that] the presence of cameras has the *potential* to deprive citizens of their ability to have a claim or right fairly resolved in the United States district courts." *Id.*

Publicly televising the proceedings in this case would give rise, we believe, to these concerns. Given the highly contentious and politicized nature of Proposition 8 and the issue of same-sex marriage in general, the possibility of compromised safety, witness intimidation, and/or harassment of trial participants is very real. Indeed, lead counsel for Plaintiffs has acknowledged that "widespread economic reprisals against financial supporters of . . . Proposition 8" resulted from public disclosure of the names of donors. Doe # 187-1 at 6-7. And the record of other forms of harassment against Proposition 8 supporters is well documented. *See id.* & Exs. B, I, K, M. For these reasons, Defendant-Intervenors must respectfully object to any departure from the policy of the Northern District of California and the Judicial Conference of the United States.

Sincerely,

/s/ Charles J. Cooper
Charles J. Cooper
Counsel for
Defendant-Intervenors

Cooper & Kirk
Lawyers
A Professional Limited Liability Company

1523 New Hampshire Avenue NW
Washington, D.C. 20036

Charles J. Cooper (202) 220-9600
ccooper@cooperkirk.com Fax (202) 220-9601

January 14, 2010

The Honorable Vaughn R. Walker
Chief Judge
United States District Court for the
Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102

Re: *Perry v. Schwarzenegger*, No. C-09-2292 VRW (N.D. Cal.)

Dear Chief Judge Walker:

I write on behalf of Defendant-Intervenors ("Proponents") to respectfully request that the Court halt any further recording of the proceedings in this case, and delete any recordings of the proceedings to date that have previously been made.

As the Court will recall, on Monday morning, just before trial commenced, the Court noted that its orders concerning public dissemination had been temporarily stayed by the Supreme Court. In response, Plaintiffs nonetheless asked the Court to record the proceedings for the purpose of later public dissemination if the stay was subsequently lifted:

> Since the stay is temporary and the Supreme Court is going to be considering these issues, and given the importance of the issues in this case, we would request that the Court permit recording and preservation of the proceedings today and through Wednesday. . . . [G]iven the fact that this is a temporary stay, and the stay order does not mention anything about restricting the ability of the court to capture the images on the cameras and preserve them in the event the stay is lifted and Judge Kozinski issues his order, we think that would be a good solution so then the materials could be posted when those – those things happen.

Tr. of Proceedings at 14-15 (Jan. 11, 2010) (Attachment A). In response, Proponents objected to the recording of the proceedings as inconsistent with the Supreme Court's temporary stay, *see id.* at 16, but the Court accepted Plaintiffs' proposal.

The Supreme Court yesterday extended the stay indefinitely. *Hollingsworth v. Perry*, 558 U.S. ___, No. 09A648, slip op. (Jan. 13, 2010) (*per curiam*). The Supreme Court's ruling removes all question that recording of the proceedings is prohibited. As the Supreme Court explained, prior to this Court's amendment to Local Rule 77-3 (which amendment, the Court concluded, was not properly adopted), Local Rule 77-3 "banned the *recording* or broadcast of court proceedings." *Hollingsworth*, slip op. at 4 (emphasis added). Unamended Local Rule77-3 thus governs these proceedings, and, as the Supreme Court held, it

has "the force of law." *Id.* at 8 (quotation marks omitted).

In short, it is now clear that the Supreme Court's stay will remain in place indefinitely, and the prohibition against the recording of these proceedings remains binding. For these reasons, Proponents renew their objection to any further recording of the proceedings in this case, and request that the Court order that any recordings previously made be deleted.

Sincerely,

/s/ Charles J. Cooper
Charles J. Cooper
Counsel for
Defendant-Intervenors

Cc: Counsel of Record

GIBSON, DUNN & CRUTCHER LLP
Theodore B. Olson, SBN 38137
tolson@gibsondunn.com
Matthew D. McGill, *pro hac vice*
1050 Connecticut Avenue, N.W., Washington, D.C. 20036
Telephone: (202) 955-8668, Facsimile: (202) 467-0539

Theodore J. Boutrous, Jr., SBN 132009
tboutrous@gibsondunn.com
Christopher D. Dusseault, SBN 177557
Ethan D. Dettmer, SBN 196046
333 S. Grand Avenue, Los Angeles, California 90071
Telephone: (213) 229-7804, Facsimile: (213) 229-7520

BOIES, SCHILLER & FLEXNER LLP
David Boies, *pro hac vice*
dboies@bsfllp.com
333 Main Street, Armonk, New York 10504
Telephone: (914) 749-8200, Facsimile: (914) 749-8300

Steven C. Holtzman, SBN 144177
sholtzman@bsfllp.com
Jeremy M. Goldman, SBN 218888
1999 Harrison Street, Suite 900,
Oakland, California 94612
Telephone: (510) 874-1000, Facsimile: (510) 874-1460

Attorneys for Plaintiffs
KRISTIN M. PERRY, SANDRA B. STIER,
PAUL T. KATAMI, and JEFFREY J. ZARRILLO

Dennis J. Herrera, SBN 139669
Therese M. Stewart, SBN 104930
Danny Chou, SBN 180240

One Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Telephone: (415) 554-4708, Facsimile (415) 554-4699

Attorneys for Plaintiff-Intervenor
CITY AND COUNTY OF SAN FRANCISCO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, *et al.*,

Plaintiffs,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

ARNOLD SCHWARZENEGGER, *et al.*,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, *et al.*,

Defendant-Intervenors.

CASE NO.
09-CV-2292 VRW

PLAINTIFFS' AND PLAINTIFF-INTERVENOR'S AMENDED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Trial Dates:
January 11 – January 27, 2010

Judge:
Chief Judge Walker

Location:
Courtroom 6, 17th Floor

(Filed Feb. 26, 2010)

* * *

PFF 230. Proponents elected not to have the majority of their designated witnesses testify at trial. Proponents withdrew one of their designated experts before trial began and four other designated experts on the first day of trial. Indeed, Proponents waited until the morning of Monday, January 11, 2010 – after the Supreme Court had already granted a stay of this Court's order permitting

broadcast of the proceedings – to announce in a two sentence letter that they "no longer intend to call as witnesses Dr. Paul Nathanson, Dr. Loren Marks, Dr. Daniel Robinson, and Dr. Katherine Young." Although Proponents' counsel stated in open court on Friday, January 15, 2010, that their witnesses "were extremely concerned about their personal safety, and did not want to appear with any recording of any sort, whatsoever," this assertion was entirely unsupported by any evidence at all and was not, on its face, credible. Proponents had notice of the possibility that the proceedings would be publicly broadcast as early as September 2009. In addition, the Court announced its decision to broadcast the proceedings on January 6, 2010, but the Supreme Court issued a temporary stay of the Court's order on January 11, 2010 – *before* Proponents' counsel sent a letter to all counsel withdrawing four of their experts. The Supreme Court issued its indefinite stay on January 13, 2010, and then this Court on January 14 withdrew this case from the Ninth Circuit's pilot program, well before Proponents had even called their first witness. Thus, from at least January 14 on, Proponents and their witnesses knew for a fact that these proceedings would not be broadcast to the public in any form. Proponents made no effort to call any witnesses other than

Mr. Blankenhorn and Dr. Miller after the Court withdrew its request to broadcast the proceedings to other federal courthouses and made clear that no such broadcast would take place. Proponents' decision to withdraw any of their experts was therefore a tactical decision unrelated to the Court's decision to broadcast the proceedings to several other federal courthouses. Indeed, all of the experts withdrawn by Proponents made damaging admissions in their depositions, and Plaintiffs' counsel predicted at the pre-trial hearing in December 2009 that Proponents would seek to withdraw their experts because of the vigorous cross-examination they had faced in deposition and would face at trial.

* * *

Public Notice

Subject:	**Contact:**	**Date Posted:**
Renewed Notice Concerning Revision of Civil Local Rule 77-3.		**02/04/2010**

RENEWED NOTICE CONCERNING REVISION OF CIVIL LOCAL RULE 77-3

The United States District Court for the Northern District of California Court has approved a revision of Civil Local Rule 77-3, subject to public comment. The revision would add the underlined language below.

77-3. Photography and Public Broadcasting.

Unless allowed by a Judge or a Magistrate Judge with respect to his or her own chambers or assigned courtroom for ceremonial purposes *or for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit*, the taking of photographs, public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in connection with any judicial proceeding, is prohibited. Electronic transmittal of courtroom proceedings and presentation of evidence within the confines of the courthouse is permitted, if authorized by the Judge or Magistrate Judge. The term "environs," as used in this rule, means all floors on which chambers, courtrooms or on which Offices of the Clerk are located, with the exception of any space specifically designated as a Press Room. Nothing in

this rule is intended to restrict the use of electronic means to receive or present evidence during Court proceedings.

The comment period will run from February 4, 2010 to March 4, 2010. If you submitted a comment during the previous comment period, you need not resubmit it. The court is interested in comments that pertain to the revised rule and NOT to its application to a particular case. All comments and suggestions regarding the content of the revised rule should be sent in writing, no later than March 4, 2010 to:

Hon. Phyllis Hamilton
Chair of the Rules Committee
United States Courthouse
1301 Clay Street
Oakland, CA 94612

File for Download:
File Type: WordPerfect

new 77-3 notice.pdf

File Size: 28 KBytes

3:09-cv-02292

Perry et al v. Schwarzenegger et al

Challenge to "Proposition 8"

Chief Judge Vaughn R Walker

United States District Court for the Northern District of California

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ATTENTION

Certain recent articles have reported incorrect information about possible broadcasting of closing arguments in Perry et. al. v. Schwarzenegger et. al., Civil Case No. 09-02292. The following is intended to provide all media pass holders and other members of the media with current and correct information.

1. On January 15, 2010, Chief Judge Walker withdrew his previous request to include Perry et. al. v. Schwarzenegger et. al. in the Ninth Circuit's pilot program permitting broadcasting of district court proceedings in limited circumstances. On the same date, Chief Judge Kozinski approved the request to withdraw the Perry case from the program. (See Order 2010-3 posted below.) Broadcasting closing arguments would require Chief Judge Walker to request that these arguments be included in the Ninth Circuit's pilot program and approval of that request by Chief Judge Kozinski. No such request has been made.

2. The presentation of evidence has not been completed; defendant-intervenors requested that their case remain open pending completion of

discovery they are seeking from third parties. The proceedings concerning this discovery are on-going.

Further information regarding the date for closing arguments will be made available on the court's web-site when a date has been scheduled.

ORDER No. 2010-3
IN THE MATTER OF PILOT DISTRICT COURT PUBLIC ACCESS PROGRAM
01/15/10

ORDER ON APPLICATION FOR STAY OF VIDEO STREAMING
09A648 HOLLINGSWORTH, DENNIS, ET AL. V. PERRY, KRISTIN M., ET AL.
(from US Supreme Court)
01/13/10

ORDER CONCERNING VIDEO STREAMING
09A648 HOLLINGSWORTH, DENNIS, ET AL. V. PERRY, KRISTIN M., ET AL.
(from US Supreme Court)
01/11/10

ORDER No. 2010-2
IN THE MATTER OF PILOT DISTRICT COURT PUBLIC ACCESS PROGRAM

Due to the level of interest in this case, this site has been created to notify the media and public of procedures and rules for admission to proceedings, as well as access to case information.

Please check this website regularly for updates.

Click here for a comprehensive guide for journalists. (PDF/0.6MB-Rev01/12/2010)

Recently Posted Documents of Special Interest: ***CLICK HERE***

To obtain information, please review the following:

Case Information:

- *Case Docket and Case Documents*
- *Calendar for Judge Walker*
- *Contact Information*
- *E-mail Announcement Lists*
- *Current Events*
- *Frequently Asked Questions (FAQ)*

Access to Proceedings:

- *Obtaining access passes for the media and public*
- *Court Rules*
- *Location and Parking*

Look to this website for further information concerning this case.
If your questions are not adequately answered, please contact the U.S. District Court at PerryProp8@cand.uscourts.gov.

Volume 1

Pages 1-213

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER

KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, and JEFFREY J. ZARRILLO, Plaintiffs, VS. ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; EDMUND G. BROWN, JR., in his official capacity as Attorney General of California; MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; and DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles, Defendants.	NO. C 09-2292-VRW San Francisco, California Monday January 11, 2010

TRANSCRIPT OF PROCEEDINGS

Reported By:

Katherine Powell Sullivan, CRR, CSR 5812
Debra L. Pas, CRR, CSR 11916
Official Reporters – U.S. District Court

* * *

[14] **MR. BOUTROUS:** Thank you, Your Honor.

Could I address one issue? Since the stay is temporary and the Supreme Court is going to be considering these issues, and given the importance of the issues in this case, we would request that the Court permit recording and preservation of the proceedings today and through Wednesday.

I've heard – having heard Mr. Cooper argue on many [15] occasions, I can't imagine why he wouldn't want his opening statement preserved for the record.

(Laughter)

So the public can hear what he has to say. And same goes for Mr. Olson.

And given the fact that this is a temporary stay, and the stay order does not mention anything about restricting the ability of the court to capture the images on the cameras and preserve them in the event the stay is lifted and Judge Kozinski issues his order, we think that would be a good solution so then the materials could be posted when those – those things happen.

THE COURT: Well, that's very much of a possibility as presently matters stand.

The only transmission of these proceedings is to the overflow courtroom in this courthouse. Any transmission beyond that is not permitted, pending some further order of the Supreme Court or the Court of Appeals, and, indeed, Chief Judge Kozinski, who would be directing the pilot project.

I think your request is a fair one. But in the event that there is no recording permitted after the issue is finally settled, if a recording is made, some disposition of that recording would have to be dealt with. And perhaps this is a matter that we can deal with after we learn what the rule is going to be in this case.

[16] I would prefer to defer it until then.

MR. BOUTROUS: That's what I would propose, Your Honor. That way, simply recording it now, and then the Court can grapple with that issue when we find out what happens on Wednesday.

THE COURT: Very well.

MR. BOUTROUS: Thank you, Your Honor.

THE COURT: Mr. Cooper.

MR. COOPER: Your Honor, I very much appreciate Mr. Boutrous's desire to ensure that my words are memorialized.

(Laughter)

But I do object to his proposal. I don't believe that it's in keeping with – although, at least as I read the Court's order, and I only had a moment to do so, I don't believe it specifically addresses this issue. But I don't think it's consistent with the spirit of that order.

So I just want to make clear our objection to that proposal. Thank you.

THE COURT: Very well. Your objection is noted.

* * *

Volume 3

Pages 458-669

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER

KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, and JEFFREY J. ZARRILLO,

Plaintiffs,

VS.

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; EDMUND G. BROWN, JR., in his official capacity as Attorney General of California; MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; and DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles,

Defendants.

NO. C 09-2292-VRW

San Francisco, California

Wednesday January 13, 2010

TRANSCRIPT OF PROCEEDINGS

Reported By:

Katherine Powell Sullivan, CRR, CSR 5812
Debra L. Pas, CRR, CSR 11916
Official Reporters – U.S. District Court

* * *

[662] **THE COURT:** And we are, I think, ready to adjourn for today. We will recommence at 8:30 in the morning.

As you may know, the Supreme Court has given us some guidance with respect to part of the issue. It seems to be a rather limited guidance at the moment.

So we may have issues beyond remote access to these proceedings by other courthouses that we'll have to take up at some point.

My inclination, without hearing from counsel and getting their advice, is that we put that issue to the side for [663] the time being and proceed with the trial. We seem to be moving along well and I don't want to do anything to alter the progress that we are making in these proceedings, but we may, indeed, have to address those issues at some later time.

So we will not have remote access to these proceedings from other courthouses in the Ninth Circuit

and elsewhere in the Federal Judiciary, but we'll have to deal with the other issues in due time.

* * *

Volume 4

Pages 670-990

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER

KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, and JEFFREY J. ZARRILLO, Plaintiffs, VS. ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; EDMUND G. BROWN, JR., in his official capacity as Attorney General of California; MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; and DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles, Defendants.	NO. C 09-2292-VRW San Francisco, California Thursday January 14, 2010

TRANSCRIPT OF PROCEEDINGS

Reported By:
Katherine Powell Sullivan, CRR, CSR 5812
Debra L. Pas, CRR, CSR 11916
Official Reporters – U.S. District Court

* * *

[674] **PROCEEDINGS**

JANUARY 14, 2010 **8:42 A.M.**

THE COURT: Very well. Good morning, Counsel.

(Counsel greet the Court.)

THE COURT: Let's see. First order of business, I have communicated to judge – Chief Judge Kozinski, in light of the Supreme Court's decision yesterday, that I'm requesting that this case be withdrawn from the Ninth Circuit pilot project. And he indicated that he would approve that request. And so that should take care of the broadcasting matter.

* * *

[753] **MR. COOPER:** Your Honor, just before we break, may I ask one minor housekeeping matter?

THE COURT: Yes.

MR. COOPER: Point of clarification, actually, and it's further to your announcement as we opened the court day, that the Court was asking for withdrawal of this case from the pilot program.

I just ask the Court for clarification, if I may then understand that the recording of these proceedings has been halted, the tape recording itself?

THE COURT: No, that has not been altered.

[754] **MR. COOPER:** As the Court knows, I'm sure, we have put in a letter to the Court asking that the recording of the proceedings be halted.

I do believe that in the light of the stay, that the court's local rule would prohibit continued tape recording of the proceedings.

THE COURT: I don't believe so. I read your letter. It does not quote the local rule.

The local rule permits remote – perhaps if we get the local rule –

MR. BOUTROUS: Your Honor, I have a copy.

THE COURT: Oh, there we go.

(Whereupon, document was tendered to the Court.)

THE COURT: The local rule permits the recording for purposes the – of taking the recording for purposes of use in chambers and that is customarily done when we have these remote courtrooms or the overflow courtrooms. And I think it would be quite helpful to me in preparing the findings of fact to have that recording.

So that's the purpose for which the recording is going to be made going forward. But it's not going to be for purposes of public broadcasting or televising.

And you will notice the local rules states that: "The taking of photographs, public [755] broadcasting or televising, or recording for those purposes."

So the recording is not being made for those purposes, but simply for use in chambers.

MR. COOPER: Very well, your Honor, and I appreciate that clarification.

THE COURT: All right.

(Whereupon there was a recess in the proceedings from 10:32 a.m. until 10:59 a.m.)

* * *

Volume 12

Pages 2535-2952

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER

KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, and JEFFREY J. ZARRILLO, Plaintiffs, VS. ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; EDMUND G. BROWN, JR., in his official capacity as Attorney General of California; MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; and DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles, Defendants.	NO. C 09-2292-VRW San Francisco, California Wednesday January 27, 2010

TRANSCRIPT OF PROCEEDINGS

Reported By:
Katherine Powell Sullivan, CRR, CSR 5812
Debra L. Pas, CRR, CSR 11916
Official Reporters – U.S. District Court

* * *

[2948] **MR. BOUTROUS:** In terms of post-trial filings.

THE COURT: Yes. Here's what I'd like. I'd like to take some time to go over all of this material.

I don't think, at this juncture, it would be helpful to have post-trial briefs. You may very well, however, wish to submit references to the evidence that have been submitted, with your proposed findings of fact and conclusions of law. Those you have already submitted.

And I'm sure that you presented the evidence in the case with those proposed findings in mind, and the conclusions. And so it would be helpful if you could furnish those to the Court.

I realize that you, too, have a lot of material to go through. So I'll be guided by your suggestion about how much time you'll need in order to do that.

What I would like to do, after receiving those, and after concluding today's proceedings, is to consider that material and then set a date for closing argument.

And what I will probably do, in connection with setting that date, is to perhaps key up some questions that have come to the fore as a result of the review of the evidence, and give you an opportunity to address that in closing argument and in any post-trial briefing that you wish to make on the law.

But I'd rather leave that date open at the present [2949] time. When the time comes, I'll have the clerk call both sides and give you a range of dates so that you can work it out consistent with, I'm sure, your many other obligations.

But I would, at this point, I think, only request references to the evidence that you've submitted in connection with your proposed findings and conclusions.

How long do you think it will – how long a time deadline would be reasonable for that submission?

MR. BOUTROUS: 30 days would be fine with us, Your Honor. And I think that that would – sounds like an excellent approach.

THE COURT: Mr. Cooper?

MR. COOPER: It seems to me that 30 days should be – should be adequate, Your Honor, yes.

THE COURT: Very well. That will be, then – well, why don't we set February 26. That's – that's just about 30 days. All right. February 26. And, probably, by that time, I'll have a much better idea of

what kind of schedule we should set for the closing argument.

* * *

(At 12:00 noon, the proceedings were adjourned.)

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(3)

No. 09-1238

In The

Supreme Court of the United States

DENNIS HOLLINGSWORTH, et al.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

ANDREW W. STROUD
MENNEMEIER, GLASSMAN & STROUD LLP
Counsel of Record for Administration Defendants
980 9th Street, Suite 1700
Sacramento, CA 95814
(916) 553-4000
Stroud@mgslaw.com

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Should the Ninth Circuit's decision denying a petition for a writ of mandamus to halt the district court's enforcement of its order be vacated and the case be remanded to the court of appeals with instructions to dismiss in accordance with United *States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)?

RESPONSE TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

Respondents Arnold Schwarzenegger in his official capacity as Governor of California; Mark B. Horton, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; and Linette Scott in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health, collectively (the "Administration Defendants"), do hereby respond to Petitioners' Petition for Writ of Certiorari as follows:

The Administration Defendants took no position on whether the trial proceedings in this matter should be publicly broadcast. In addition, the Administration Defendants did not participate in any of the proceedings before the United States Court of Appeals for the Ninth Circuit on this issue.

Accordingly, the Administration Defendants neither oppose, support, nor take any position as to Petitioners' request that this Court grant their writ of certiorari for purposes of vacating the Ninth Circuit's order denying their petition for writ of mandamus.

and remanding to the Ninth Circuit with instructions to dismiss the mandamus petition as moot.

Respectfully submitted,

ANDREW W. STROUD
MENNEMEIER, GLASSMAN & STROUD LLP
Counsel of Record for Administration Defendants
980 9th Street, Suite 1700
Sacramento, CA 95814
(916) 553-4000
Stroud@mgslaw.com

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No. 09-1238

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, ET AL.,

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION FOR KRISTIN M. PERRY ET AL.

THEODORE J. BOUTROUS, JR.
CHRISTOPHER D. DUSSEAULT
THEANE EVANGELIS KAPUR
ENRIQUE A. MONAGAS
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7804

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tolson@gibsondunn.com

Counsel for Respondents
Kristin M. Perry, Sandra B. Stier,
Paul T. Katami, and Jeffrey J. Zarrillo

[Additional Counsel Listed on Inside Cover]

DENNIS J. HERRERA
THERESE M. STEWART
VINCE CHHABRIA
CHRISTINE VAN AKEN
SAN FRANCISCO CITY ATTORNEY'S
OFFICE
One Dr. Carlton B. Goodlett Place
San Francisco, CA 94102
(415) 554-4700

Counsel for Respondent City and
County of San Francisco

QUESTION PRESENTED

Whether this Court should vacate a two-sentence, unpublished, nonprecedential lower-court order that denies a request for mandamus that petitioners concede is now moot.

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BRIEF IN OPPOSITION FOR KRISTIN M. PERRY ET AL.

Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo ("plaintiffs"), and the City and County of San Francisco, respectfully submit this brief in opposition to the petition for a writ of certiorari filed by Dennis Hollingsworth et al.

OPINIONS BELOW

The order of the court of appeals denying the petition for a writ of mandamus is neither published nor electronically reported. Pet. App. 1. The order of the district court is also unpublished and unreported. *Id.* at 2.

JURISDICTION

The court of appeals entered its order denying the petition for a writ of mandamus on January 8, 2010. This Court lacks jurisdiction over the merits of petitioners' mandamus request because petitioners concede that their request is moot. Pet. 11.

STATEMENT

Petitioners ask this Court to vacate a two-sentence, unpublished, nonprecedential lower-court order that denies a request for mandamus that petitioners concede is moot. Petitioners seek that unprecedented relief without making any effort to demonstrate that the "extraordinary" equitable remedy of vacatur is appropriate in this case. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994). Granting petitioners the relief they request would vastly expand the circumstances under which vacatur is appropriate, needlessly undermine the fi-

nality of lower-court decisionmaking, and inevitably generate an avalanche of similarly insubstantial vacatur requests in this Court. The petition for a writ of certiorari should be denied.

1. Plaintiffs are gay and lesbian Californians who filed suit in the United States District Court for the Northern District of California challenging Proposition 8 ("Prop. 8")—the California constitutional amendment that extinguished their right to marry—under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Petitioners are the official proponents of Prop. 8 who orchestrated the campaign to place Prop. 8 on the November 2008 election ballot and to secure its passage. Petitioners intervened in this case to defend the constitutionality of Prop. 8. The district court scheduled a trial to begin on January 11, 2010.

2. On January 7, 2010, the district court formally requested that the Chief Judge of the Ninth Circuit include this case "in the Ninth Circuit pilot project on audio-video recording and transmission," and permit the trial proceedings to be recorded, transmitted to designated federal courthouses outside the Northern District of California, and posted on the district court's website. Pet. App. 3. On January 8, 2010, Chief Judge Kozinski approved that request, "limited to real-time live streaming to federal courthouses." *Id.* at 4.

Also on January 8, petitioners filed a petition for a writ of mandamus in the Ninth Circuit seeking to overturn the district court's decision to record and transmit the trial proceedings for public distribution. The Ninth Circuit denied the petition the same day in an unpublished, nonprecedential order that stated, in its entirety:

> Petitioners have not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. *See Bauman v. United States Dist. Court*, 557 F.2d 650 (9th Cir. 1977).
>
> Accordingly, the petition is denied.

Pet. App. 1.

3. On January 9, 2010, petitioners filed an application with Justice Kennedy seeking a stay of the district court's order regarding the recording and distribution of the trial proceedings pending the filing of a petition for a writ of certiorari. On January 11, 2010, the first day of the trial, this Court issued a temporary stay of the district court's order, except as it permitted distribution of the trial proceedings "to other rooms within the confines of the courthouse in which trial is to be held." *Hollingsworth v. Perry*, 130 S. Ct. 1132, 1132 (2010). On January 13, 2010, this Court issued a per curiam opinion that extended the stay pending the filing of a petition for certiorari. *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010).

In accordance with the stay, the district court limited transmission of the trial court proceedings to an overflow courtroom "within the confines of the courthouse in which trial [was] held." *See* Pet. App. 35. The district court also requested that the case be removed from the Ninth Circuit's pilot program on audio-video recording. *Id.* at 5. Chief Judge Kozinski granted that request. *Id.*

Witness testimony ended on January 27, 2010, and the district court heard closing arguments on June 16, 2010. No part of the trial was publicly transmitted outside the courthouse in which the trial was held.

REASONS FOR DENYING THE PETITION

The petition for certiorari should be denied because petitioners have not identified any basis—let alone the requisite "extraordinary" justification—for vacating the Ninth Circuit's two-sentence, unpublished, nonprecedential order.

Petitioners concede that their mandamus petition seeking to overturn the district court's decision to record and publicly distribute the trial proceedings is "moot." Pet. 11. Indeed, petitioners could hardly have contended otherwise: The district court's decision was stayed by this Court before the trial began, the case was removed from the Ninth Circuit's pilot program on audio-video recording in response to this Court's stay, and the trial has now been completed without any of the proceedings having been transmitted outside the confines of the courthouse in which they took place. Petitioners acknowledge that, "[a]s a result of these post-stay actions by the district court, Petitioners have, in effect, obtained the relief they sought through their mandamus petition." *Id.* at 12. The dispute that was the subject of the petition for mandamus is therefore over, and the mandamus request no longer presents a live case or controversy. *See Lane v. Williams*, 455 U.S. 624, 633 (1982) (where plaintiffs "have obtained all the relief that they sought" when filing suit, "no live controversy remains"); *cf. Lopez v. Gonzales*, 549 U.S. 47, 52 n.2 (2006).

Where an issue on which review is being requested is acknowledged to be moot at the time the Court considers a petition for certiorari—or where the Court identifies mootness later in the proceedings—the appropriate course is to deny or dismiss the petition. *See, e.g., Williams v. Allen*, 552 U.S.

803 (2007); *Aguilar v. Quarterman*, 547 U.S. 1204 (2006); *Jordan v. Ohio*, 543 U.S. 952 (2004); *see also City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 286 (2001).

Despite the undisputed absence of a live controversy between the parties on the issue under review, petitioners contend that the Court should grant certiorari and vacate the Ninth Circuit's summary order denying their mandamus petition. That unorthodox request finds no support in this Court's precedent, in the principles of equity that govern the availability of vacatur, or in standards of sound judicial administration.

Petitioners premise their vacatur request almost exclusively on this Court's decision in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). In so doing, they entirely overlook this Court's subsequent decision in *Bonner Mall*, which makes clear that vacatur is an "extraordinary remedy" and that "[i]t is petitioner's burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate . . . equitable entitlement" to that remedy. 513 U.S. at 26. Granting vacatur in the absence of extraordinary circumstances, the Court emphasized, would undermine the "public interest" and "disturb the orderly operation of the federal judicial system." *Id.* at 26, 27; *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997) (holding that "'exceptional circumstances'" were present to justify a mootness-based vacatur because the plaintiff's actions had denied defendant an opportunity to obtain appellate review of an adverse decision).

Petitioners do not even attempt to argue that this case presents the type of "exceptional" circumstances that are alone sufficient to warrant the equi-

table remedy of vacatur. And with good reason. Leaving the Ninth Circuit's unpublished and nonprecedential order undisturbed would have absolutely no consequences for the parties themselves—or for the public at large. That two-sentence order has no continuing relevance to the parties' underlying dispute regarding the constitutionality of Prop. 8 and will have no precedential effect in future litigation between other parties.

In contrast, there would be profound consequences—for the judicial system, in general, and for this Court, in particular—if parties were entitled to the extraordinary remedy of a mootness-based vacatur on the wholly un-extraordinary grounds offered by petitioners. A decision in petitioners' favor could generate an exponential increase in the number of requests for mootness-based vacaturs in this Court and the courts of appeals—diverting scarce judicial resources from more important tasks, undermining parties' settled expectations about the finality of judicial decisions, and eviscerating lower-court precedent "valuable to the legal community as a whole." *Bonner Mall*, 513 U.S. at 26. "Respect for lower courts, the public interest in finality of judgments, and concern about [this Court's] own expanding certiorari docket all counsel against [such] undisciplined GVR'ing." *Lawrence v. Chater*, 516 U.S. 163, 174 (1996) (per curiam).

The serious repercussions of issuing unnecessary mootness-based vacaturs underscore the truly exceptional nature of this equitable remedy. As the Court has done until now, it should reserve that powerful—and potentially disruptive—remedy for cases where the party seeking vacatur has demonstrated a compelling justification for relief from the lower-court

judgment. Petitioners have not come close to meeting that substantial burden in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE J. BOUTROUS, JR.
CHRISTOPHER D. DUSSEAULT
THEANE EVANGELIS KAPUR
ENRIQUE A. MONAGAS
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7804

Counsel for Respondents Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tolson@gibsondunn.com

Counsel for Respondents Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo

DENNIS J. HERRERA
THERESE M. STEWART
VINCE CHHABRIA
CHRISTINE VAN AKEN
SAN FRANCISCO CITY ATTORNEY'S OFFICE
One Dr. Carlton B. Goodlett Place
San Francisco, CA 94102
(415) 554-4700

Counsel for Respondent City and County of San Francisco

July 2, 2010

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

CHARLES J. COOPER
Counsel of Record
MICHAEL W. KIRK
HOWARD C. NIELSON, JR.
JESSE M. PANUCCIO
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, NW
Washington, D.C. 20036
(202) 220-9600
ccooper@cooperkirk.com
Counsel for Petitioners

July 19, 2010

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATUTE

28 U.S.C. § 2106 2

Petitioners have suggested that the issue presented in their petition for certiorari has become moot and have asked this Court to vacate the order below in accordance with this Court's "established practice" when a case has "become moot while on its way here or pending [this Court's] decision on the merits." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Respondents agree that the case is moot, noting that the district court, "[i]n accordance with the stay" entered by this Court, "limited transmission of the trial court proceedings to an overflow courtroom 'within the confines of the courthouse in which trial [was] held.'" Brief of Respondents in Opposition for Kristin M. Perry, *et al.* ("Opp. Cert.") at 3, quoting Pet. App. 35. Respondents oppose vacatur of the order below, however, arguing that such relief is "unprecedented" and "unorthodox" in the absence of "extraordinary circumstances," although respondents fail to specify or otherwise describe what such circumstances might entail.

As we demonstrate below, respondents have misread the law on the proper disposition by this Court of mooted federal cases. Moreover, recent developments in the litigation below, which were not disclosed in respondents' brief in opposition, confirm that this Court should grant the petition for a writ of certiorari, vacate the order entered by the Ninth Circuit denying the petition for a writ of mandamus, and remand with instructions to dismiss the mandamus petition as moot.

I. This Court's Settled Precedents and Established Practice Make Clear that Petitioners Are Entitled to *Munsingwear* Relief.

Far from "unorthodox," Opp. Cert. at 5, or "unprecedented," *id.* at 1, vacatur of lower federal court judgments in mooted cases has been the "established," "ordinary," "settled," and "commonly utilized" procedure in this Court for over 60 years. Indeed, as this Court made clear in *Munsingwear*,

> The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. . . . That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance.

340 U.S. at 39-40; *see also id.* at 41 (explaining that this procedure is "commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences"); 28 U.S.C. § 2106.

Respondents argue that we have "overlook[ed]" *U.S. Bancorp Mortgage Company v. Bonner Mall Partnership*, 513 U.S. 18 (1994). *See* Opp. Cert. at 5. To the contrary, *Bancorp* in no way undermined the

settled rule that applies in these circumstances, for the Court in that case merely declined to extend the *Munsingwear* rule to cases that become moot by *reason of settlement*:

> We hold that mootness by reason of settlement does not justify vacatur of a judgment under review. This is not to say that vacatur can never be granted when mootness is produced in that fashion. As we have described, the determination is an equitable one, and exceptional circumstances may conceivably counsel in favor of such a course.

Id. at 29. Indeed, the *Bancorp* Court expressly embraced the *Munsingwear* rule when, as here, mootness arises from other causes. As the Court explained:

> A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment. . . . The same is true when mootness results from unilateral action of the party who prevailed below.

Id. at 25.

Thus, while *Bancorp* held that a showing of "exceptional circumstances" *is* necessary to obtain vacatur when mootness results from a settlement, 513 U.S. at 29, it reaffirmed categorically that "fairness," *id.* at 25, and "the public interest," *id.* at 27, militate in favor of vacatur when mootness results

from "the vagaries of circumstance" or the "unilateral action of the party who prevailed below," *id.* at 25. In such circumstances, mootness without more "provides sufficient reason to vacate." *Id.* at 25 n.3.

Respondents' interpretation of *Bancorp* is thus belied by the express language of that very decision. But it is also refuted by this Court's subsequent decisions. Indeed, just this Term, this Court reaffirmed that it "normally do[es] vacate the lower court judgment in a moot case because doing so 'clears the path for future relitigation of the issues between the parties,' preserving 'the rights of all parties,' while prejudicing none 'by a decision which . . . was only preliminary.'" *Alvarez v. Smith*, 130 S. Ct. 576, 581 (2009) (quoting *Munsingwear*, 340 U.S. at 40); *see also id.* ("In *Bancorp*, however, we described circumstances where we would not do so."). And, consistent with its "ordinary practice," *id.* at 583, this Court has repeatedly and routinely granted certiorari, vacated the appellate decision below, and remanded with orders to dismiss as a matter of course where a federal case has become moot for reasons other than a settlement. *See, e.g., Indiana State Police Pension Trust v. Chrysler LLC*, 130 S. Ct. 1015 (2009); *Radian Guaranty, Inc. v. Whitfield*, 128 S. Ct. 2901 (2008); *Selig v. Pediatric Specialty Care, Inc.*, 551 U.S. 1142 (2007); *Harper v. Poway Unified School District*, 549 U.S. 1262 (2007). This Court's settled practice thus refutes respondents' hyperbolic

claims that "profound consequences," and "serious repercussions," Opp. Cert. at 6, would result from granting the standard *Munsingwear* relief sought by petitioners in this case.

Nor do the four other cases cited by respondents support their claim that – outside the context of mootness resulting from a settlement – "[w]here an issue on which review is being requested is acknowledged to be moot at the time the Court considers a petition for certiorari . . . the appropriate course is to deny or dismiss the petition." Opp. Cert. at 4. Three of those decisions involved petitions for review of a *state court* judgment. *See Aguilar v. Quarterman*, 547 U.S. 1204 (2006) (No. 05-11108) (Tex. Ct. Crim. App.); *Jordan v. Ohio*, 543 U.S. 952 (2004) (No. 04-5574) (Ohio); *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001) (Wis. Ct. App.). As this Court has made clear, however, the *Munsingwear* rule, which is predicated on this Court's "supervisory authority over the lower federal courts," does not apply to cases arising in the state courts. *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 621 n.1 (1989). Thus, for cases arising in the lower *federal courts*, "the settled disposition of a case that has become entirely moot is for this Court to 'vacate the judgment below and remand with a direction to dismiss.'" *Id.* (quoting *Munsingwear*, 340 U.S. at 39). But for cases arising in the *state courts*, "the regular practice . . . has been to dismiss the case and leave the judgment of the state court undisturbed, which evinces a proper recognition that in

the absence of any live case or controversy, [this Court] lack[s] jurisdiction and thus also the power to disturb the state court's judgment." *Id.*; *accord City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. at 283-84. And in the fourth case cited by respondents – a capital case that became moot by reason of the petitioner's execution, *see Williams v. Allen*, 552 U.S. 803 (2007) (No. 07-6034) – there is no indication that the petitioner sought (or could have sought) vacatur. It has long been established, however, that a party waives its right to vacatur by not seeking that remedy. *See, e.g.*, *Munsingwear*, 340 U.S. at 40-41.[1]

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[1] Respondents also invoke *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), and *Lawrence v. Chater*, 516 U.S. 163 (1996), in support of their argument for disregarding the *Munsingwear* rule. Neither decision supports respondents, however. In *Arizonans for Official English*, the Court expressly recognized "'the established practice'" of vacatur "when mootness occurs though happenstance" or "the 'unilateral action of the party who prevailed in the lower court.'" *Id.* at 71-72 (quoting *Munsingwear*, 340 U.S. at 39, and *Bancorp*, 513 U.S. at 23). And while the Court did note the "'exceptional circumstances' that abound[ed]" in that case, it did so in support of its decision to vacate not only the unreviewable decision of the appellate court, but all of the previous decisions – including those of the trial court – in that case. *Id.* at 75 (concluding "that vacatur down the line is the equitable solution"). *Lawrence* did not even address the appropriate disposition of a case that has become moot pending review by this Court. Rather, it addressed the distinct disposition of granting, vacating, and remanding *for further proceedings* in light of intervening developments. *See* 516 U.S. 165-66; *id.* at 178 & n.1 (Scalia, J., dissenting). In all events, the Court in that case reaffirmed its broad authority and discretion

(Continued on following page)

In this case, respondents do not contend that mootness has arisen because of a settlement or other voluntary action by the petitioners. Rather, the events that have mooted the controversy regarding the district court's order allowing dissemination of the trial proceedings outside "the confines of the courthouse where the trial [was] held" – specifically, this Court's stay of the district court's order allowing such dissemination and the district court's subsequent withdrawal both of its order and of the amendment to the local rules purporting to authorize that order – are classic examples of "the vagaries of circumstance," "happenstance," and perhaps even the "unilateral action of the party who prevailed below"[2] within the meaning of *Munsingwear* and its progeny. *See Bancorp*, 513 U.S. at 25 & n.3. Accordingly, because the controversy regarding the public broadcast of the trial proceedings in this case has become moot, "fairness" and "the public interest" plainly require vacatur of the Ninth Circuit's order pursuant to this Court's "established practice." *Id.* at 25, 27; *Munsingwear*, 340 U.S. at 39.

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to order such a disposition and indeed did so in that case. *Id.* at 165-66.

[2] The district court was the nominal defendant in the mandamus proceeding below.

II. Post-Petition Developments Confirm that this Court Should Grant *Munsingwear* Relief.

While the fact that the controversy regarding the public broadcast of the trial proceedings has become moot, standing alone, "provides sufficient reason to vacate" the order below under this Court's precedents, *Bancorp*, 513 U.S. at 25 n.3, significant developments have occurred subsequent to the filing of the petition for a writ of certiorari that confirm that this Court should grant the petition, vacate the Ninth's Circuit's order, and remand with instructions to dismiss the mandamus petition as moot.

Although the district court unequivocally assured petitioners that the sole purpose of its continued video recording of the trial proceedings in this case was for its own use in chambers, *see* App. 41a-43a; Supp. App. 2a, the district court *sua sponte* issued the following order on May 31, 2010:

> In the event any party wishes to use portions of the trial recording during closing arguments, a copy of the video can be made available to the party. Parties will of course be obligated to maintain as strictly confidential any copy of the video pursuant to paragraph 7.3 of the protective order, Doc # 425. Any party wishing to make use of the video during closing arguments is DIRECTED to inform the court clerk not later than June 2, 2010 at 5 PM PDT.

Supp. App. 14a. Respondents (plaintiffs below) requested and were given a video recording of the entire trial, *see* Supp. App. 18a, and they played portions of that recording during closing arguments, *see* Supp. App. 29a-30a. Plaintiff-Intervenor City and County of San Francisco requested and was given portions of the trial recording, *see* Supp. App. 15a, but did not seek to play any portion of that recording at during closing arguments.[3]

Furthermore, after the conclusion of closing arguments, petitioners requested that respondents and the plaintiff-intervenor promptly return all copies of the trial video to the district court. When that request was refused, petitioners moved the district court on June 29, 2010 "for an order requiring Plaintiffs and Plaintiff-Intervenor to return to the Court immediately all copies of the trial video in their possession." Supp. App. 25a. Both respondents and the plaintiff-intervenor opposed this request, proposing instead "that once judgment is entered, the parties and the Court evaluate whether, and to what degree, the trial recording would be useful to the parties or to

[3] The district court did not, however, permit the broadcasting of closing arguments outside of the courthouse. *See, e.g.*, Supp. App. 21a (denying media coalition's request for "recording, broadcasting and webcasting closing arguments"); *see also* Supp. App. 3a-5a (media coalition's request); *id.* 6a-11a (petitioners' objection to media coalition's request).

the Court in connection with any additional proceedings and/or appeal." Supp. App. 29a-30a. The district court has not yet ruled on this matter.

Thus, while all concede that petitioners' attempt to obtain mandamus relief reversing the district court's order permitting the broadcast of the trial proceedings outside of the courthouse has become moot, *see* Opp. Cert. at 4, a dispute over the proper disposition of the video recordings made by the district court for its own use "in chambers" has already arisen. Indeed, respondents' indication that they may wish to use those recordings in connection with appeals in this case – which could implicate many of the concerns that prompted petitioners to oppose public broadcast of the trial proceedings in the first instance – suggests that litigation relating to the appropriate use of these recordings may occur in the future. Petitioners respectfully submit that vacatur is uniquely warranted given these exceptional circumstances to prevent the Ninth Circuit's judgment, now "unreviewable because of mootness, from spawning any legal consequences" in ongoing or subsequent litigation between the parties below. *Munsingwear*, 340 U.S. at 41.

For the foregoing reasons, as well as those reasons stated in the petition for a writ of certiorari, petitioners respectfully request that this Court grant the petition, vacate the order of the Ninth Circuit denying their petition for a writ of mandamus, and

remand to the Ninth Circuit with instructions to dismiss the mandamus petition as moot.

Respectfully submitted,

CHARLES J. COOPER
Counsel of Record
MICHAEL W. KIRK
HOWARD C. NIELSON, JR.
JESSE M. PANUCCIO
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, NW
Washington, D.C. 20036
(202) 220-9600
ccooper@cooperkirk.com
Counsel for Petitioners

July 19, 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M PERRY, SANDRA B STIER, PAUL T KATAMI and JEFFREY J ZARRILLO,

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

ARNOLD SCHWARZENEGGER, in his official capacity as governor of California; EDMUND G BROWN JR, in his official capacity as attorney general of California; MARK B HORTON, in his official capacity as director of the California Department of Public Health and state registrar of vital statistics; LINETTE SCOTT, in her official capacity as deputy director of health information & strategic planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as clerk-recorder of the County of Alameda; and DEAN C LOGAN, in his official capacity as

No C 09-2292 VRW

NOTICE TO PARTIES

(Filed Jan. 15, 2010)

registrar-recorder/county clerk
for the County of Los Angeles,

Defendants,

DENNIS HOLLINGSWORTH, GAIL J KNIGHT, MARTIN F GUTIERREZ, HAKSHING WILLIAM TAM, MARK A JANSSON and PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIOFORNIA [sic] RENEWAL, as official proponents of Proposition 8,

Defendant-Intervenors. /

In compliance with the Supreme Court's order in *Hollingsworth v Perry*, 558 US___, No 09A648 (January 13, 2010), as noted on the record at trial this date, the undersigned has formally requested Chief Judge Kozinski to withdraw this case from the pilot project on transmitting trial court proceedings to remote federal courthouse locations or for broadcast or webcast approved by the Ninth Circuit Judicial Council on December 17, 2009. Transmission of the proceedings to other locations solely within the San Francisco courthouse will continue along with recording for use in chambers, as permitted in Civ LR 77-3.

/s/ Vaughn Walker
VAUGHN R WALKER
United States District
Chief Judge

Davis Wright Tremaine LLP

Thomas R. Burke
Suite 800
505 Montgomery Street
San Francisco, CA 94111-6533

Tel 415.276.6552
Fax 415.276.6599

Email: thomasburke@dwt.com

May 18, 2010

The Honorable Vaughn R. Walker
Chief Judge of the U.S. District Court
Northern District of California
Courtroom 6, 17th Floor
450 Golden Gate Ave.
San Francisco, CA 94102

Re: **Case No. 09-CV-02292-VRW *Perry, et al v. Schwarzenegger, et al***
Media Coalition's Request for Camera Access to Record Closing Arguments

Dear Judge Walker:

On behalf Cable News Network, In Session (formerly known as "Court TV"), Fox News, NBC News, CBS News, the Hearst Corporation, Dow Jones & Company, Inc., the Associated Press, the Los Angeles Times, the McClatchy Company, KQED Public Radio (and on behalf of National Public Radio) and the Northern California Chapter of the Radio & Television News Directors Association (the "Media Coalition"), we write to inform the Court of the Media Coalition's interest in recording, broadcasting and webcasting the closing arguments (tentatively scheduled for June 16, 2010) in this case. We also request that

the Court approve this access request and formally ask Chief Judge Kozinski to again include this case in the pilot project approved by the Ninth Circuit Judicial Council on December 17, 2009, for the sole purpose of recording, broadcasting and webcasting the parties' respective closing arguments.

The Media Coalition respectfully make this request with appreciation of the U.S. Supreme Court's opinion in *Hollingsworth v. Perry,* 558 U.S., No. 09A648 (Jan. 13, 2010), which two days later, led this Court to formally request that Chief Judge Kozinski withdraw this case from the Ninth Circuit's pilot project. Since then, the United States District Court for the Northern District of California re-opened the public comment period (which ran from February 4 through March 4, 2010) and effective April 20, 2010, local rule 77-3 was amended to authorize "the taking of photographs, public broadcasting or televising, or recording" as a part of "a pilot or other project authorized by the Judicial Council of the Ninth Circuit." The Court's change to local rule 77-3 was consistent with federal law and the Supreme Court's January 13th opinion. Moreover, because the June 16th court proceedings will solely consist of the arguments of counsel – and not witness testimony or evidence – the concerns earlier reviewed by the Supreme Court should not preclude this opportunity to enhance the public's ability to witness the parties' respective closing arguments in this historic case.

If the requested electronic access is granted by this Court and Chief Judge Kozinski, the Media Coalition

will be prepared to assist the Court's staff to address any technical or logistical issues to facilitate the recording, broadcasting and webcasting of this anticipated one-day proceeding.

On behalf of the Media Coalition, we appreciate the Court's consideration of this request.

Respectfully submitted,

Davis Wright Tremaine LLP for the Media Coalition

/s/ Thomas R. Burke
Thomas R. Burke

Cooper & Kirk
Lawyers
A Professional Limited Liability Company

Charles J. Cooper
ccooper@cooperkirk.com
1523 New Hampshire Avenue NW
Washington, D.C. 20036
(202) 220-9600
Fax (202) 220-9601

May 24, 2010

The Honorable Vaughn R. Walker
Chief Judge
United States District Court for the
Northern District of California
450 Golden Gate Ave.
San Francisco, CA 94102

Re: *Perry v. Schwarzenegger*, No. C-09-2292 VRW (N.D. Cal.)

Dear Chief Judge Walker:

I write on behalf of Defendant-Intervenors Hollingsworth, Knight, Gutierrez, Jansson, and Protect-Marrige.com ("Proponents") in response to the Media Coalition's letter of May 18, 2010, Doc # 670, and to reiterate our objection to public broadcast of the trial proceedings in this case. Despite the Supreme Court's determination that "[t]his case is . . . not a good one for a [public broadcast] pilot program," *Hollingsworth v. Perry,* 130 S. Ct. 705, 714 (2010), the Media Coalition again asks this Court to publicly broadcast a portion of the trial proceedings. Proponents respectfully submit that an order permitting public

broadcast would violate (i) the letter and spirit of the Supreme Court's stay order, (ii) the only valid Northern District of California and Ninth Circuit policies bearing upon this issue, and (iii) Proponents' due process rights to a fair trial. Accordingly, the Media Coalition's request should be promptly rejected.

First, an order allowing trial proceedings to be broadcast publicly would violate the Supreme Court's stay of this Court's order authorizing "the broadcast of [this] federal trial." *Hollingsworth,* 130 S. Ct. at 706; *see also id.* at 709 ("We therefore stay the court's January 7, 2010, order to the extent that it permits the live streaming of court proceedings. . . ."). As the Court explained, even "[i]f Local Rule 77-3 had been validly revised, questions would still remain about the District Court's decision to allow broadcasting of this particular trial." *Id.* at 714. These questions led the Court to conclude, as noted above, that this case is ill-suited for inclusion in an experimental pilot program.

Second, under controlling Ninth Circuit policy, this Court has no authority to enter an order permitting public broadcast in this case, and to the extent revised L.R. 77-3 purports to allow for such authority, it is invalid. Pursuant to federal statute, the Ninth Circuit Judicial Council is authorized to make or amend "[a]ny general order relating to practice and procedure . . . *only after* giving appropriate public notice and an opportunity for comment." 28 U.S.C. § 332(d)(1) (emphasis added). In 1996, the Ninth Circuit Judicial Council "adopt[ed] the policy of

the Judicial Conference of the United States" banning the public broadcast of proceedings in federal district courts. *See* Doc # 324-1 at 4 (hereinafter the "1996 Policy"). Since that time, the Judicial Council has not given "appropriate notice and an opportunity for comment" of a proposed amendment to the governing 1996 Policy. The Judicial Council did issue a press release on December 17, 2009, stating that it "has approved, on an experimental basis, the limited use of cameras in federal district courts within the circuit" – an "action" which purports to "amend[ ] [the] 1996 Ninth Circuit policy."[1] The December 17 press release, however, did not comport with the statutory requirements for notice and comment and is therefore invalid. *See* 130 S. Ct. at 711 (concluding that the amended version of L.R. 77-3 "appears to be invalid" because the Court failed to give the statutorily required public notice and an opportunity for comment); *see also id.* at 712 (citing 28 U.S.C. § 332(d)(1) and noting that the Ninth Circuit's policy amendment "was not adopted after notice and comment procedures"). Thus, because the 1996 Policy remains the only valid Circuit rule in effect, this Court has no authority to permit public broadcast of trial proceedings. *See* 28 U.S.C. § 332(d)(2) ("All judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council.").

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[1] *See* http://www.ce9.uscourts.gov/cm/articlefiles/137-Dec17_Cameras_Press%20Relase.pdf.

Third, neither the amendment to L.R. 77-3 nor the Ninth Circuit Judicial Council's press release sets forth any standards or guidelines to regulate the selection of cases and the use of cameras during trial proceedings. The Supreme Court explicitly emphasized that this was a serious defect that supported its "decision to grant extraordinary relief." *Hollingsworth*, 130 S. Ct. at 713; *see also id.* ("The District Court here attempted to revise its rules in haste . . . to allow broadcasting of this high-profile trial without any considered standards or guidelines in place."); *id.* (explaining that "the lack of a regular rule with proper standards to determine the guidelines for broadcasting could compromise the orderly, decorous, rational traditions that courts rely upon to ensure the integrity of their own judgments"); *id.* (stating that "Congress has illustrated the need for careful guidelines and standards" in any program authorizing public broadcast of federal trial proceedings). Indeed, the Judicial Council's press release authorizes the "chief judge of the district court in consultation with the chief circuit judge" to select cases for public broadcast of district court trial proceedings. It appears, in fact, that the chief judges of the District Court and the Ninth Circuit have absolute discretion to select these cases. Yet neither the press release nor revised L.R. 77-3 provides any procedure by which litigants and other interested parties may present concerns and objections to the chief judges. This raises serious due process concerns.

Fourth, there is little merit to the Media Coalition's argument that "the concerns earlier reviewed by the Supreme Court should not preclude" the public broadcast of closing arguments because they "will solely consist of the arguments of counsel – and not witness testimony or evidence." As an initial matter, the parties may play excerpts from the video-recorded depositions during the course of closing arguments. In any case, in *Hollingsworth*, the Supreme Court specifically cited the findings and policies of the Judicial Conference of the United States, noting that while those policies "may not be binding on the lower courts, they are at the very least entitled to respectful consideration." 130 S. Ct. at 712 (quotation marks omitted). While it is true that the deleterious effect of public broadcast on witnesses is one of the concerns undergirding the Judicial Conference's policy, it is by no means the only concern. As we have explained previously, the Judicial Conference's policy also rests on findings that public broadcast has negative effects on some judges and attorneys, including distraction, grandstanding, and avoidance of unpopular decisions or positions. Moreover, the Judicial Conference has repeatedly stressed that "the presence of cameras in a trial courtroom . . . increases security and safety issues" and that "[t]hreats against judges, lawyers, and other participants could increase even beyond the current disturbing level." Doc # 324-2 at 4. And all of these findings were with respect to run-of-the-mine cases, not "high-profile, divisive cases" like this one. *Hollingsworth*, 130 S. Ct. at 714 (citing "warning by Judge Edward R. Becker that in 'truly high-profile

cases,' one can '[j]ust imagine what the findings would be' ").

For all of these reasons, and in light of the Supreme Court's stay opinion, Proponents respectfully submit that the Court should deny the Media Coalition's renewed request to publicly broadcast this federal trial.

Respectfully submitted,

/s/ Charles J. Cooper
Charles J. Cooper
Counsel for Proponents

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M PERRY, SANDRA B STIER, PAUL T KATAMI and JEFFREY J ZARRILLO,

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

ARNOLD SCHWARZENEGGER, in his official capacity as governor of California; EDMUND G BROWN JR, in his official capacity as attorney general of California; MARK B HORTON, in his official capacity as director of the California Department of Public Health and state registrar of vital statistics; LINETTE SCOTT, in her official capacity as deputy director of health information & strategic planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as clerk-recorder of the County of Alameda; and DEAN C LOGAN, in his official capacity as

No C 09-2292 VRW

ORDER

(Filed May 31, 2010)

registrar-recorder/county clerk
for the County of Los Angeles,

Defendants,

DENNIS HOLLINGSWORTH, GAIL J KNIGHT, MARTIN F GUTIERREZ, HAKSHING WILLIAM TAM, MARK A JANSSON and PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIOFORNIA [sic] RENEWAL, as official proponents of Proposition 8,

Defendant-Intervenors. /

In the event any party wishes to use portions of the trial recording during closing arguments, a copy of the video can be made available to the party. Parties will of course be obligated to maintain as strictly confidential any copy of the video pursuant to paragraph 7.3 of the protective order, Doc #425. Any party wishing to make use of the video during closing arguments is DIRECTED to inform the court clerk not later than June 2, 2010 at 5 PM PDT.

IT IS SO ORDERED.

/s/ Vaughn Walker
VAUGHN R WALKER
United States District
Chief Judge

DENNIS J. HERRERA, State Bar #139669
City Attorney
THERESE M. STEWART, State Bar #104930
Chief Deputy City Attorney
DANNY CHOU, State Bar #180240
Chief of Complex and Special Litigation
RONALD P. FLYNN, State Bar #1841867
VINCE CHHABRIA, State Bar #208557
ERIN BERNSTEIN, State Bar #231539
CHRISTINE VAN AKEN, State Bar #241755
MOLLIE M. LEE, State Bar #251404
Deputy City Attorneys
City Hall, Room 234
One Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Telephone: (415) 554-4708
Facsimile: (415) 554-4699

Attorneys for Plaintiff-Intervenor
CITY AND COUNTY OF SAN FRANCISCO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, et al, Plaintiffs, CITY AND COUNTY OF SAN FRANCISCO, Plaintiff-Intervenor vs. ARNOLD SCHWARZENEGGER,	Case No. 09-CV-2292 VRW **NOTICE TO COURT CLERK FROM PLAINTIFF-INTERVENOR CITY AND COUNTY OF SAN FRANCISCO RE USE OF VIDEO** (Filed Jun. 2, 2010)

in his official capacity as Governor of California, et al Defendants, DENNIS HOLINGSWORTH, as official proponents of Proposition 8, et al, Defendant-Intervenors,	Trial: Jan. 11-27, 2010 Judge: Chief Judge Vaughn R. Walker Location: Courtroom 6, 17th Floor

NOTICE

Please take NOTICE that pursuant to the Court's Order [Doc #672], Plaintiff-Intervenor wishes to obtain a copy of the following portions of the trial video to review for possible use at closing argument:

Trial Date	**Witness**
January 14, 2010	Egan
January 15, 2010	Zia
January 19, 2010	Sanders / Badgett
January 20, 2010	Kendall

Plaintiff-Intervenor will maintain the video as strictly confidential pursuant to paragraph 7.3 of the protective order in this case [Doc #425].

Dated: June 2, 2010

DENNIS J. HERRERA
City Attorney
THERESE M. STEWART
Chief Deputy City Attorney
DANNY CHOU
Chief of Complex & Special Litigation
RONALD P. FLYNN
VINCE CHHABRIA
ERIN BERNSTEIN
CHRISTINE VAN AKEN
MOLLIE M. LEE
Deputy City Attorneys

By: /s/
THERESE M. STEWART

Attorneys for Plaintiff-Intervenor
CITY AND COUNTY OF SAN FRANCISCO

GIBSON, DUNN & CRUTCHER LLP
Theodore B. Olson, SBN 38137
tolson@gibsondunn.com
Matthew D. McGill, *pro hac vice*
Amir C. Tayrani, SBN 229609
1050 Connecticut Avenue, N.W., Washington, D.C. 20036
Telephone: (202) 955-8668, Facsimile: (202) 467-0539

Theodore J. Boutrous, Jr., SBN 132009
tboutrous@gibsondunn.com
Christopher D. Dusseault, SBN 177557
Ethan D. Dettmer, SBN 196046
Sarah E. Piepmeier, SBN 227094
Theane Evangelis Kapur, SBN 243570
Enrique A. Monagas, SBN 239087
333 S. Grand Avenue, Los Angeles, California 90071
Telephone: (213) 229-7804, Facsimile: (213) 229-7520

BOIES, SCHILLER & FLEXNER LLP
David Boies, *pro hac vice*
dboies@bsfllp.com
333 Main Street, Armonk, New York 10504
Telephone: (914) 749-8200, Facsimile: (914) 749-8300

Jeremy M. Goldman, SBN 218888
jgoldman@bsfllp.com
Theodore H. Uno, SBN 248603
1999 Harrison Street, Suite 900, Oakland, California 94612
Telephone: (510) 874-1000, Facsimile: (510) 874-1460

Attorneys for Plaintiffs
KRISTIN M. PERRY, SANDRA B. STIER,
PAUL T. KATAMI, and JEFFREY J. ZARRILLO

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, *et al.*,

Plaintiffs,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

ARNOLD SCHWARZENEGGER, *et al.*,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, *et al.*,

Defendant-Intervenors.

CASE NO. 09-CV-2292 VRW

NOTICE TO COURT CLERK RE PLAINTIFFS' REQUEST FOR A COPY OF THE TRIAL RECORDING

(Filed June 2, 2010)

Trial: January 11-27, 2010

Judge: Chief Judge Vaughn R. Walker
Magistrate Judge Joseph C. Spero

Location: Courtroom 6, 17th Floor

Pursuant to this Court's May 31, 2010 order, Doc #672, Plaintiffs respectfully request a copy of the trial recording for possible use during closing arguments.

Respectfully submitted,

DATED: June 2, 2010

GIBSON, DUNN & CRUTCHER LLP
Theodore B. Olson
Theodore J. Boutrous, Jr.
Christopher D. Dusseault
Ethan D. Dettmer
Matthew D. McGill
Amir C. Tayrani
Sarah E. Piepmeier
Theane Evangelis Kapur
Enrique A. Monagas

By: /s/
Theodore B. Olson

and

BOIES, SCHILLER & FLEXNER LLP
David Boies
Steven Holtzman
Jeremy M. Goldman
Roseanne C. Baxter
Richard J. Bettan
Beko O. Richardson
Theodore H. Uno
Joshua I. Schiller

Attorneys for Plaintiffs KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, and JEFFREY J. ZARRILLO

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M PERRY, SANDRA B STIER, PAUL T KATAMI and JEFFREY J ZARRILLO,

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

ARNOLD SCHWARZENEGGER, in his official capacity as governor of California; EDMUND G BROWN JR, in his official capacity as attorney general of California; MARK B HORTON, in his official capacity as director of the California Department of Public Health and state registrar of vital statistics; LINETTE SCOTT, in her official capacity as deputy director of health information & strategic planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as clerk-recorder of the County of Alameda; and DEAN C LOGAN, in his official capacity as

No C 09-2292 VRW

ORDER

(Filed Jun. 9, 2010)

registrar-recorder/county clerk
for the County of Los Angeles,

Defendants,

DENNIS HOLLINGSWORTH, GAIL J KNIGHT, MARTIN F GUTIERREZ, HAKSHING WILLIAM TAM, MARK A JANSSON and PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIOFORNIA [sic] RENEWAL, as official proponents of Proposition 8,

Defendant-Intervenors. /

The court is in receipt of the letter dated May 18, 2010 from a coalition of media organizations informing the court of the media coalition's interest in recording, broadcasting and webcasting closing arguments in the above-captioned case. Doc #670.

The court removed the case from the Ninth Circuit pilot project on audio-video recording and transmission on January 15, 2010. Doc #463. No further request to include the case in the pilot program is contemplated. The media coalition's request is therefore DENIED.

IT IS SO ORDERED.

/s/ Vaughn Walker
VAUGHN R WALKER
United States District
Chief Judge

COOPER AND KIRK, PLLC
Charles J. Cooper (DC Bar No. 248070)*
ccooper@cooperkirk.com
David H. Thompson (DC Bar No. 450503)*
dthompson@cooperkirk.com
Howard C. Nielson, Jr. (DC Bar No. 473018)*
hnielson@cooperkirk.com
Nicole J. Moss (DC Bar No. 472424)*
nmoss@cooperkirk.com
Peter A. Patterson (OH Bar No. 0080840)*
ppatterson@cooperkirk.com
1523 New Hampshire Ave. N.W., Washington, D.C. 20036
Telephone: (202) 220-9600, Facsimile: (202) 220-9601

LAW OFFICES OF ANDREW P. PUGNO
Andrew P. Pugno (CA Bar No. 206587)
andrew@pugnolaw.com
101 Parkshore Drive, Suite 100, Folsom, California 95630
Telephone: (916) 608-3065, Facsimile: (916) 608-3066

ALLIANCE DEFENSE FUND
Brian W. Raum (NY Bar No. 2856102)*
braum@telladf.org
James A. Campbell (OH Bar No. 0081501)*
jcampbell@telladf.org
15100 North 90th Street, Scottsdale, Arizona 85260
Telephone: (480) 444-0020, Facsimile: (480) 444-0028

ATTORNEYS FOR DEFENDANT-INTERVENORS
DENNIS HOLLINGSWORTH, GAIL J. KNIGHT,
MARTIN F. GUTIERREZ, MARK A. JANSSON,
AND PROTECTMARRIAGE.COM – YES ON 8,
A PROJECT OF CALIFORNIA RENEWAL

* Admitted *pro hac vice*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, and JEFFREY J. ZARRILLO,

Plaintiffs

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; EDMUND G. BROWN, JR., in his official capacity as Attorney General of California; MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; and DEAN C.

CASE NO. 09-CV-2292 VRW

DEFENDANT-INTERVENORS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, MARK A. JANSSON, AND PROTECT-MARRIAGE.COM'S MOTION FOR ADMINISTRATIVE RELIEF

(Filed Jun. 29, 2010)

LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, HAKSHING WILLIAM TAM, and MARK A. JANSSON; and PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIFORNIA RENEWAL,

Defendant-Intervenors.

Additional Counsel of Defendant-Intervenors

ALLIANCE DEFENSE FUND
Timothy Chandler (CA Bar No. 234325)
tchandler@telladf.org
101 Parkshore Drive, Suite 100, Folsom, California 95630
Telephone: (916) 932-2850, Facsimile: (916) 932-2851

Jordan W. Lorence (DC Bar No. 385022)*
jlorence@telladf.org
Austin R. Nimocks (TX Bar No. 24002695)*
animocks@telladf.org
801 G Street NW, Suite 509, Washington, D.C. 20001
Telephone: (202) 393-8690, Facsimile: (202) 347-3622

* Admitted *pro hac vice*

TO THE PARTIES AND THEIR ATTORNEYS OF RECORD: PLEASE TAKE NOTICE that pursuant to Civ. L.R. 7-11, Defendant-Intervenors Hollingsworth, Knight, Gutierrez, Jansson, and ProtectMarriage.com ("Proponents") hereby move the Court for an order requiring Plaintiffs and Plaintiff-Intervenor to return to the Court immediately all copies of the trial video in their possession.

BACKGROUND

On January 13, 2010, the Supreme Court stayed this Court's order that the trial proceedings in this case be recorded and broadcast beyond the San Francisco federal courthouse. *Hollingsworth v. Perry*, 130 S. Ct. 705, 714-15 (2010). The stay remains in effect. *Id.*

In court the next day, Proponents asked "for clarification . . . that the recording of these proceedings has been halted, the tape recording itself." Trial Tr. 753. When the Court responded that the recording had "*not* been altered," Proponents reiterated that, "in light of the stay, . . . the court's local rule . . . prohibit[s] continued tape recording of the proceedings." *Id.* at 753-54 (emphasis added). Rejecting Proponents' objection, the Court stated that the "local rule permits . . . recording for purposes of *use in chambers* and that is customarily done when we have these remote courtrooms or the overflow courtrooms." *Id.* (emphasis added). The Court concluded, "that's the purpose for which the recording is going to be made going forward." *Id.*

On May 31, the Court *sua sponte* announced: "In the event any party wishes to use portions of the trial recording during closing arguments, a copy of the video can be made available to the party." Doc #672 at 2. Plaintiffs and Plaintiff-Intervenor each requested and obtained copies of the trial video – the former requesting the entire video, the latter the testimony of certain witnesses. *See* Doc ##674, 675.

Closing arguments were held on June 16. Proponents thereafter requested Plaintiffs and Plaintiff-Intervenor promptly to return all copies of the trial video in their possession to the Court, but they denied the request. *See* Decl. or Peter A. Patterson in Support of Proponents' Motion for Administrative Relief.

ARGUMENT

Now that closing arguments are complete, the sole purpose identified by this Court for disseminating copies of the trial video to Plaintiffs and Plaintiff-Intervenor – potential use at closing argument – has been satisfied. There is simply no legitimate justification for permitting Plaintiffs and Plaintiff-Intervenor to maintain possession of copies of the trial video.

What is more, in issuing its stay order, the Supreme Court held that "irreparable harm" would "likely result" from public broadcast of the trial. *Hollingsworth*, 130 S. Ct. at 712. The risk of such harm, of course, does not depend on the means by which a trial recording is made public. And even with this

Court's requirement that all copies of the trial video be "maintain[ed] as strictly confidential," Doc #672 at 2, it cannot be denied that dissemination beyond the confines of the Court has increased the possibility of accidental public disclosure. In light of this possibility, we respectfully submit that there is no justification for this Court to permit Plaintiffs and Plaintiff-Intervenor to maintain copies of the trial recording.

CONCLUSION

For these reasons, Proponents request an order directing Plaintiffs and Plaintiff-Intervenor to return to the Court immediately all copies of the trial video in their possession.

Dated: June 29, 2010

COOPER AND KIRK, PLLC
ATTORNEYS FOR DEFENDANT-INTERVENORS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, MARK A. JANSSON, AND PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIFORNIA RENEWAL

By: /s/ Charles J. Cooper
Charles J. Cooper

GIBSON, DUNN & CRUTCHER LLP
Theodore B. Olson, SBN 38137
tolson@gibsondunn.com
Matthew D. McGill, *pro hac vice*
1050 Connecticut Avenue, N.W., Washington, D.C. 20036
Telephone: (202) 955-8668, Facsimile: (202) 467-0539

Theodore J. Boutrous, Jr., SBN 132009
tboutrous@gibsondunn.com
Christopher D. Dusseault, SBN 177557
Ethan D. Dettmer, SBN 196046
333 S. Grand Avenue, Los Angeles, California 90071
Telephone: (213) 229-7804, Facsimile: (213) 229-7520

BOIES, SCHILLER & FLEXNER LLP
David Boies, *pro hac vice*
dboies@bsfllp.com
333 Main Street, Armonk, New York 10504
Telephone: (914) 749-8200, Facsimile: (914) 749-8300

Jeremy M. Goldman, SBN 218888
jgoldman@bsfllp.com
1999 Harrison Street, Suite 900, Oakland, California 94612
Telephone: (510) 874-1000, Facsimile: (510) 874-1460

Attorneys for Plaintiffs
KRISTIN M. PERRY, SANDRA B. STIER,
PAUL T. KATAMI, and JEFFREY J. ZARRILLO

Dennis J. Herrera, SBN 139669
Therese M. Stewart, SBN 104930
Danny Chou, SBN 180240

One Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Telephone: (415) 554-4708, Facsimile (415) 554-4699

Attorneys for Plaintiff-Intervenor
CITY AND COUNTY OF SAN FRANCISCO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, *et al.*,

Plaintiffs,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

ARNOLD SCHWARZENEGGER, *et al.*,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, *et al.*,

Defendant-Intervenors.

CASE NO. 09-CV-2292 VRW

PLAINTIFFS' AND PLAINTIFF-INTERVENOR'S OPPOSITION TO DEFENDANT-INTERVENORS' MOTION FOR ADMINISTRATIVE RELIEF

(Filed Jun. 29, 2010)

Trial: January 11-27, 2010

Closing: June 16, 2010

Judge: Chief Judge Vaughn R. Walker
Magistrate Judge Joseph C. Spero

Location: Courtroom 6, 17th Floor

Plaintiffs and Plaintiff-Intervenor respectfully request that the Court deny Defendant-Intervenors' motion for administrative relief. Doc #696. On May 31, 2010, the Court informed the parties that the trial video would be made available "[i]n the event any

party wishes to use portions of the trial recording during closing arguments." Doc #672. The Court stated that "[p]arties will of course be obligated to maintain as strictly confidential any copy of the video pursuant to paragraph 7.3 of the protective order, Doc #425." *Id.* Plaintiffs and Plaintiff-Intervenor both requested copies of the trial video, Docs #674, 675, and Plaintiffs used portions of the video during closing argument.

Because this Court has yet to issue its decision and may request additional arguments or briefing before doing so, Defendant-Intervenors' request for the immediate return of the trial video should be denied as premature. Plaintiffs and Plaintiff-Intervenor respectfully propose that once judgment is entered, the parties and the Court evaluate whether, and to what degree, the trial recording would be useful to the parties or to the Court in connection with any additional proceedings and/or appeal. In the meantime, the protective order remains in place and ensures that the trial recording will not be publicly disclosed.

Respectfully submitted,

DATED:
June 29, 2010

GIBSON, DUNN & CRUTCHER LLP
Theodore B. Olson
Theodore J. Boutrous, Jr.
Christopher D. Dusseault
Ethan D. Dettmer
Matthew D. McGill
Amir C. Tayrani
Sarah E. Piepmeier

Theane Evangelis Kapur
Enrique A. Monagas

By: /s/
Theodore B. Olson

and

BOLES, SCHILLER & FLEXNER LLP
David Boies
Steven C. Holtzman
Jeremy M. Goldman
Rosanne C. Baxter
Richard J. Bettan
Beko O. Richardson
Theodore H. Uno
Joshua Irwin Schiller

Attorneys for Plaintiffs
KRISTIN M. PERRY,
SANDRA B. STIER,
PAUL T. KATAMI, and
JEFFREY J. ZARRILLO

DENNIS J. HERRERA
City Attorney
THERESE M. STEWART
Chief Deputy City Attorney
DANNY CHOU
Chief of Complex and
Special Litigation
RONALD P. FLYNN
VINCE CHHABRIA
ERIN BERNSTEIN
CHRISTINE VAN AKEN
MOLLIE M. LEE
Deputy City Attorneys